

# Arresting DNA: The Evolving Nature of DNA Collection Statutes and their Fourth Amendment Justifications

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## I. INTRODUCTION

*New technologies test the judicial conscience. On the one hand, they hold out the promise of more effective law enforcement . . . . On the other hand, they often achieve these ends by intruding, in ways never before imaginable, into the realms protected by the Fourth Amendment. . . . The good news [with DNA Fingerprinting] is that it lets police identify people far more easily than would be possible using retro technology. The bad news is that those people could well be us.<sup>1</sup>*

Mayor Michael Bloomberg recently proposed taking DNA samples from all individuals arrested in New York City.<sup>2</sup> Similarly, police in Daytona Beach, Florida recently announced that they will begin seeking DNA samples from all individuals they arrest in the hopes of capturing a serial murderer.<sup>3</sup> Maryland Governor Martin O'Malley, joined by the State Attorney General, recently made a personal appeal to the state legislature for a law requiring the taking of DNA samples from individuals arrested for certain violent felonies.<sup>4</sup> These actions highlight what is an increasing trend in the area of DNA collection. More and more states and law enforcement

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<sup>1</sup> United States v. Kincade, 379 F.3d 813, 871 (9th Cir. 2004) (en banc) (Kozinski, J., dissenting).

<sup>2</sup> Jim Dwyer, *License, Registration And DNA, Please*, N.Y. TIMES, January 19, 2008, at B1. "In fact, the city hopes to develop portable machinery to test suspects at crime scenes, even before any arrest." Jim Dwyer, *Mayor Turns Suddenly Shy About Money*, N.Y. TIMES, April 11, 2009, at A12.

<sup>3</sup> Kristen Reed and Rachael Jackson, *Daytona Cops to Take DNA in All Arrests*, ORLANDO SENTINEL, February 7, 2008, available at <http://www.orlandosentinel.com/news/local/volusia/orl-dna0708feb07,0,476106.story>. The Daytona Beach chief of police responded to this story by emphasizing that police will only be seeking these DNA samples through consent. Mike Chitwood, *Daytona Police Don't Coerce for DNA Samples, or Keep All*, DAYTONA BEACH NEWS J., March 1, 2008, at A5. Nonetheless, a bill recently proposed to the Florida legislature would require DNA collection from individuals arrested for certain violent and sexual crimes. Eileen Zaffiro, *Lynn Pushes Bill to Collect DNA of All Suspects*, DAYTONA BEACH NEWS-JOURNAL, March 4, 2008, at A7.

<sup>4</sup> Timothy B. Wheeler, *O'Malley Urges DNA Collection*, BALTIMORE SUN, February 14, 2008, at B2.

agencies are seeking to obtain DNA samples from individuals suspected of a crime but not yet convicted.

The traditional way to obtain DNA from an individual suspected of a crime has been to obtain a search warrant based on probable cause. When the probable cause standard cannot be met, however, police must resort to other methods of obtaining DNA. Among the more creative ways are to either surreptitiously collect the DNA through trickery or deception<sup>5</sup> or gather it after it has been discarded.<sup>6</sup> In addition to these, more effective—albeit less creative—ways are also increasingly being used. Laws requiring individuals to submit to a DNA sample upon conviction and storage of these samples in large databases are the primary method through which the potential of DNA in law enforcement has been employed.<sup>7</sup> The contents of these databases are scanned for a match with a sample usually taken from a crime scene or victim. The effectiveness of this technique, however, is dependent on the size of the database.

In recent years, the federal government has sought to enlarge the federal database—the Combined DNA Index System (CODIS). The DNA Fingerprint Act of 2005, passed with little attention as Title X of the Violence Against Women Act Reauthorization, allows the federal government to take and retain DNA samples from anyone charged with a federal crime or whose DNA has been collected pursuant to any state law.<sup>8</sup> All states require persons *convicted* of certain crimes to submit to DNA testing, but as the proposal by Mayor Bloomberg mentioned earlier suggests, more and more state legislatures have passed laws requiring DNA samples be taken from various groups of *arrestees* as well.

A number of these laws requiring individuals to submit to testing have been challenged on the grounds that they authorize unreasonable searches in

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<sup>5</sup> See *State v. Athan*, 158 P.3d 27, 37–38 (Wash. 2007) (holding that an individual has no privacy interest in DNA left on envelope mailed to police and that police deception in tricking him into mailing the letter to them was not a violation of due process).

<sup>6</sup> Carolyn Thompson, *Police DNA Collection Sparks Questions*, USA TODAY, March 17, 2007, available at [http://www.usatoday.com/news/nation/2007-03-17-dna-collection\\_N.htm?csp=34](http://www.usatoday.com/news/nation/2007-03-17-dna-collection_N.htm?csp=34). Police in this case followed a man suspected of committing a rape and stabbing over thirty years ago and gathered DNA from his saliva after he spat on the sidewalk.

<sup>7</sup> DNA can also be taken pursuant to a simple warrant supported by probable cause. For a general overview of legal challenges made to DNA collection and retention actions made through the 1990s, see Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Databanks*, 67 BROOK. L. REV. 127, 132–57 (2001).

<sup>8</sup> DNA Fingerprint Act of 2005, 42 U.S.C. §§ 14132(a)(1)(B)–(C) (2006). For a discussion of the full scope of this, see *infra*, Part II.B.

violation of the Fourth Amendment. Most have been upheld; though they have divergent rationales and have typically involved statutes involving individuals who have been convicted of crimes, not arrestees.<sup>9</sup> Cases addressing the constitutionality of requiring DNA samples from arrestees, specifically, are fewer in number and suggestive of more of a split. The Supreme Court has yet to address the constitutional limits of such databases and the rationale that may help define these limits.

Because the number of states requiring arrestees to submit to DNA testing is increasing at an alarming rate, however, the Court is likely to be forced to address their constitutionality in one form or another in the coming years. Arrestee DNA testing is substantially distinct from the testing of convicted persons. Perhaps the most important distinction to be made is in the precise characteristics of the group affected by such laws. Those individuals who are forced to give up their DNA under arrestee statutes can essentially be divided into two groups: those that are ultimately found guilty of the crime for which they have been arrested and those that are not. Those in the first group are not really representative of a gain for law enforcement because their DNA would likely be submitted anyway upon conviction under the statutes requiring those convicted of certain crimes to submit to DNA sampling. Instead, it is the second group of individuals that represents the additional gain achieved in the investigation of past and future crimes. What is noteworthy—and troublesome—about this second group, however, is that it can be defined, as mentioned, as that group of arrestees who are *not guilty* of the crime for which they have been arrested—whether it is through a verdict of not guilty, dismissal of charges, or immediate release after the submission of the sample. If the requirements of reasonableness and probable cause in the Fourth Amendment are to mean anything, surely they must mean that forcible submission to physically invasive searches by a group that is not guilty of the crime that has put them in the government's sights is impermissible.

The use of DNA as an accurate and helpful form of identification is no doubt a very legitimate—and even just—method of law enforcement. That said, the combination of databases quickly expanding to include innocent persons, increasingly novel ways of using the information contained in our

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<sup>9</sup> Compare *United States v. Weikert*, 504 F.3d 1, 7–8 (1st Cir. 2007) (using a balancing test), *Banks v. United States*, 490 F.3d 1178, 1183 (10th Cir. 2007) (same), *United States v. Kraklio*, 451 F.3d 922, 924 (8th Cir. 2006) (same), and *United States v. Castillo-Lagos*, 147 Fed. App'x 71, 75 (11th Cir. 2005) (same) with *United States v. Amerson*, 483 F.3d 73, 78 (2d Cir. 2007) (using the “special needs” test), and *United States v. Hook*, 471 F.3d 766, 772–74 (7th Cir. 2006) (same). The Sixth Circuit has upheld the 2004 Act under both tests. *United States v. Conley*, 453 F.3d 674, 677–81 (6th Cir. 2006).

DNA,<sup>10</sup> and recent Fourth Amendment jurisprudence from courts around the country is resulting in a state of affairs that is very likely incongruent with the proper scope intended by the Fourth Amendment. In Part II, this Note will give background information about the usefulness of DNA in criminal investigations and an overview of current state and federal DNA collection statutes. Part III describes the Fourth Amendment challenges that have been made to many of these laws and the differences in the rationales given by the courts, and explores how some of these rationales might apply to newer, more inclusive laws covering arrestees. Lastly, Part IV argues that DNA collection statutes seeking forcibly to require individuals merely arrested for a crime should not be found constitutional under the Fourth Amendment.

## II. BACKGROUND

The usefulness of DNA to law enforcement authorities is a relatively recent discovery. Indeed, the structure of DNA has been known for only approximately forty years, and scientists are still not completely sure of how every aspect of it functions. In order to fully understand why DNA is an

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<sup>10</sup> Researchers have begun to study an alleged link between genetics and certain criminal or violent behaviors with their findings being incorporated into legal arguments made in the courtroom. See Erica Beecher-Monas & Edgar Garcia-Rill, *Genetic Predictions of Future Dangerousness: Is There a Blueprint for Violence?*, 69 S.P.G. LAW & CONTEMP. PROBS. 301 (2006) (questioning whether biological knowledge of violence and sexual violence should factor into sentencing proceedings and problems inherent in this practice); Deborah W. Denno, *Revisiting the Legal Link Between Genetics and Crime*, 69 S.P.G. LAW & CONTEMP. PROBS. 209, 220–38 (2006) (discussing the prevalence of genetic arguments being made on behalf of defendants facing murder convictions and the courts' skeptical response); David H. Kaye, *Behavioral Genetics Research and Criminal DNA Databases*, 69 S.P.G. LAW & CONTEMP. PROBS. 259, 260 (2006) (arguing that evidence of a "crime gene" is "scientifically naïve," that databases would not be useful in behavioral research, and that many states already prohibit medical research being done from DNA samples in databanks). However, further advancement in these areas may provide police with a new use for DNA databases. Rather than starting with a DNA sample from a crime scene to which individualized suspicion attaches and using the database to identify the sample, databases may be used *as a starting point* in an investigation by grouping samples in the database according to their genetic profiles for violence, aggression, or introversion and then focusing an investigation on those individuals whose profiles match that of the unknown suspect, as described by a witness or evidenced through a crime. Whether such use of a database could be used to obtain a warrant is questionable.

Additionally, phenotypic details such as eye color and hair color can be gleaned from DNA samples. Tania Simoncelli & Sheldon Krinsky, Am. Const. Soc'y for L. and Pol'y, Issue Brief, *A New Era of DNA Collections: At What Cost to Civil Liberties?* at 11 (2007), available at <http://www.acslaw.org/node/5352>. Thus, the potential for DNA to be used in this way underscores the sheer intimacy of personal details that may be exposed to the public through our genetic code.

especially potent tool in solving crime, it is necessary to understand a bit about what DNA is and how it functions as a unique identifier of individuals. With this, it becomes easy to see why so many states have sought to seize upon its potential for solving crimes. Their laws have taken a variety of forms, but there is a clear trend in the United States towards requiring arrestees to give DNA samples to the police.<sup>11</sup>

#### A. A Primer on DNA and Why it's Useful in Law Enforcement

Every cell in the human body contains 46 chromosomes, each of which consists of an extraordinarily long and highly compacted chain of DNA, which stands for deoxyribonucleic acid.<sup>12</sup> DNA, in turn, is structured as a double helix, with each of the long "backbones" made up sugars and phosphate groups.<sup>13</sup> Planted along the length of each backbone are polymers known as nucleotides, which come in four different forms: adenine, thymine, guanine, and cytosine.<sup>14</sup> The connection between the two backbones is made by hydrogen bonds connecting individual nucleotides.<sup>15</sup>

The precise order of the different nucleotides serves as instructions on how to create different proteins and, ultimately, to direct the functioning of the cell.<sup>16</sup> While all humans share an enormous amount of similarities in the order of nucleotides, there are sufficient differences between individuals to provide each individual with a completely unique pattern, or code.<sup>17</sup> It is this

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<sup>11</sup> This trend is following behind that in the United Kingdom toward greater DNA collection and retention. Calls have already been made to have the UK database include everyone in the country. *Rape Police Call for DNA Database on All Britons*, TIMES ONLINE, Mar. 4, 2004, <http://www.timesonline.co.uk/tol/news/article1037237.ece>. Currently, police in the UK are seeking to take DNA from individuals found to be speeding or littering. Richard Ford, *Police Want DNA From Speeding Drivers and Litter Louts on Database*, THE TIMES, Aug. 2, 2007, at 2. More recently, two individuals cleared of crimes have brought suit in the European court of human rights seeking to have their DNA samples expunged from British databases. Matthew Weaver, *Britons Begin Legal Battle of DNA Database*, THE GUARDIAN UNLIMITED, February 27, 2008, available at <http://www.guardian.co.uk/uk/2008/feb/27/eu.justice>. If successful, the approximately 13% of Great Britain's database that is comprised of individuals never convicted of a crime may have to be destroyed. *Id.*

<sup>12</sup> NEIL A. CAMPBELL, JANE B. REECE & LAWRENCE G. MITCHELL, BIOLOGY 207-08 (5th ed. 1999).

<sup>13</sup> *Id.* at 78-79.

<sup>14</sup> *Id.* at 79.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 316.

<sup>17</sup> *Id.*, at 383. Close relatives share more similarities in their DNA than unrelated persons; thus, related individuals can be identified out of an otherwise unidentified set of

uniqueness that police departments use to identify a particular individual as the source of DNA found at the scene of a crime.<sup>18</sup> In particular, the Combined DNA Index System ("CODIS"), which is maintained by the FBI, has specified thirteen specific regions of DNA to be used for this identification.<sup>19</sup>

Beyond this identity, particular regions of the string of DNA making up a chromosome are known as genes and serve as the functional code from which proteins are made.<sup>20</sup> In a more ultimate sense, the particular form a given gene takes determines everything from whether a person will have a widow's peak or attached earlobes to whether he or she will develop cystic fibrosis or Huntington's Disease.<sup>21</sup> Propensities for heart disease, certain types of cancer, and many other health problems can also be found from looking at a person's DNA.<sup>22</sup> As mentioned earlier, a great deal of research is being undertaken to study the relationship between a person's particular pattern of gene expression and their pattern of behavior.<sup>23</sup>

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samples. This provides DNA databases with the ability to "reach beyond" the individuals whose DNA is contained therein to their close relatives. This approach is controversial, but has been advanced in Boston and Denver. Jonathan Saltzman, *State Police may Hunt for a Suspect Using Kin's DNA*, BOSTON GLOBE, Apr. 17, 2007, at A1, B3; Amy Herdy, *New DNA Testing Could Involve Shaking Down Family Tree*, KUSA NEWS, May 23, 2007, <http://www.9news.com/news/article.aspx?storyid=70705>; see also 60 Minutes Report on Yahoo News, *DNA: Going Too Far?*, June 6, 2007 (on file with author).

<sup>18</sup> CAMPBELL ET AL., *supra* note 12, at 382.

<sup>19</sup> Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 34 J. L. MED. & ETH. 165, 166 (2006).

<sup>20</sup> CAMPBELL ET AL., *supra* note 12, at 294–95, 316.

<sup>21</sup> *Id.* at 252–55; see also, *DNA Fingerprints Predict Brain Disorders*, WASH. POST, Jan. 18, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/18/AR2008011802652.html>.

<sup>22</sup> CAMPBELL ET AL., *supra* note 12, at 256. As a result of this, many have worried that health insurers will begin to seek DNA samples to detect a predisposition to certain conditions as part of the process of obtaining health insurance. Amy Harmon, *Insurance Fears Lead Many to Shun DNA Tests*, N.Y. TIMES, February 24, 2008, at A25. An industry spokeswoman has stated that insurers have no desire to seek such information, but a recent study found that in 7 of 92 underwriting decisions for hypothetical applicants a genetic predisposition for disease resulted in denial of coverage. *Id.* The House of Representatives has passed the Genetic Nondiscrimination Act of 2007 to prohibit insurers from discriminating on the basis of genetic information, but the Senate has yet to take action on the bill. Genetic Information Nondiscrimination Act of 2008, Pub. L. 110-223, 122 Stat. 881 (2008).

<sup>23</sup> See *supra* note 10 and accompanying text.

## B. State and Federal Arrestee DNA Collection and Retention

The DNA collected by law enforcement authorities is not all contained in a single database. A complex network of state and federal laws creates a dual system whereby federal law provides the overall structure and enables sharing of DNA profiles among the states, while the states themselves set the most precise limits on whose DNA can and cannot be collected and retained. What follows is an overview of both the federal and state laws governing DNA collection and retention.

### 1. Federal Arrestee DNA Collection and Retention Statutes

The federal database, CODIS, was created in 1990 and evolved over the course of the decade to serve as a link between the databases of each state.<sup>24</sup> It is divided into several different indexes: convicted offenders, forensic, arrestee (where state law permits), missing persons, and unidentified human remains.<sup>25</sup> By April of 2004, the database contained a total of 1,762,005 DNA profiles.<sup>26</sup> By October of 2007, however, CODIS had been expanded to contain 5,265,258 DNA profiles, of which, 5,070,473 profiles are from convicted offenders and 194,785 are from forensic samples.<sup>27</sup> No statistics are given as to the number of profiles contained in the arrestee, missing persons, and unidentified human remains indexes. This threefold expansion of the number of profiles in the database can be attributed, however, to recent federal and state laws expanding the size of DNA databases.

The DNA Fingerprint Act of 2005 expanded the collection authority of the FBI and permits the maintenance of:

- (1) DNA identification records of—
  - (A) persons convicted of crimes;
  - (B) persons who have been charged in an indictment or information with a crime; and
  - (C) other persons whose DNA samples are collected under applicable legal authorities, provided that DNA samples that are voluntarily submitted solely for elimination purposes shall not be included in the National DNA Index System;
- (2) analyses of DNA samples recovered from crime scenes;
- (3) analyses of DNA samples recovered from unidentified human remains;

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<sup>24</sup> Maclin, *supra* note 19.

<sup>25</sup> Fed. Bureau of Investigation, CODIS Brochure, *available at* <http://www.fbi.gov/hq/lab/pdf/codisbrochure.pdf>.

<sup>26</sup> Maclin, *supra* note 19.

<sup>27</sup> Fed. Bureau of Investigation, NDIS Statistics, *available at* <http://www.fbi.gov/hq/lab/codis/clickmap.htm> (last visited Feb. 14, 2009).

and

- (4) analyses of DNA samples voluntarily contributed from relatives of missing persons.<sup>28</sup>

Subsection (C) is notable because its reference to “applicable legal authorities” seems to allow the inclusion of DNA samples collected pursuant to state and local laws over which the federal government has little to no control.<sup>29</sup> In addition to arrestee DNA collected pursuant to state authorities, the DNA Analysis Backlog Elimination Act of 2000 was amended in 2006 to permit the Attorney General to collect DNA samples from “individuals who are arrested or from non-United States persons who are detained under the authority of the United States.”<sup>30</sup> The only way to have one’s profile expunged from CODIS is through a final court order saying that a conviction has been overturned or that no conviction resulted from the arrest.<sup>31</sup>

## *2. State Arrestee DNA Collection and Retention Statutes*

Aside from these federal laws, all states permit DNA databases in some form or another, while fourteen now require DNA collection from certain arrestees. Among the largest databases are California, which has 1,078,077

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<sup>28</sup> DNA Fingerprint Act of 2005, 42 U.S.C. § 14132(a) (2006).

<sup>29</sup> An amendment to the Act made shortly after it became law struck language that had prohibited the inclusion in CODIS of “DNA profiles from arrestees who have not been charged in an indictment or information with a crime.” Pub. L. 109-162, § 1002(1) (2006).

<sup>30</sup> Pub. L. 109-162, § 1004, codified as 42 U.S.C. § 14135a(a)(1)(A) (2006).

<sup>31</sup> DNA Fingerprint Act of 2005, 42 U.S.C. §§ 14132(d)(1)–(2) (2006). These requirements take the form of requiring the federal government to expunge profiles obtained through arrests under federal authority. State access to CODIS is made contingent upon the existence of laws or rules mandating similar expungement from state databases. *Id.* Thus, the current state of the law does not seem to be amenable to challenges by arrestees to the long-term retention of their DNA in databases such as CODIS. There have been allegations of “offline” databases, however, which include DNA collected from individuals without their consent or oversight under state law. One such suit was brought in New York state against an allegedly offline database being maintained by the New York Medical Examiner’s Office. *See* Brief for the New York Civil Liberties Union and the Innocence Project as Amici Curiae Supporting Defendant, *People v. Hendrix*, Indictment No. 3668/03 (N.Y. App. Div. Dec. 30, 2004).



profiles in CODIS,<sup>32</sup> Texas, which contains 349,386 profiles,<sup>33</sup> and New York, which contains 289,622 profiles.<sup>34</sup>

These states also have some of the most inclusive laws in the country. In California, against strenuous opposition,<sup>35</sup> a ballot initiative was passed on November 2, 2004, known as "The DNA Fingerprint, Unsolved Crime, and Innocence Protection Act," or Proposition 69. It permits the taking of DNA samples from all persons, including juveniles, who are convicted of a felony or sex offense, even misdemeanors.<sup>36</sup> The ACLU Foundation of Southern California filed a class action lawsuit against Proposition 69, challenging it as a violation of the Fourth Amendment and Due Process.<sup>37</sup> The suit failed, however, and beginning in 2009, DNA samples are required of all persons arrested for any felony offense.<sup>38</sup>

In Texas, all persons indicted of certain offenses, mainly sex offenses, must submit to DNA testing, as must all persons arrested for such crimes who have previously been convicted of one.<sup>39</sup> Additionally, all samples legally collected in the course of an investigation may be included, as well, regardless of their origin.<sup>40</sup> Further, if any state law permits or requires the creation of a DNA record, the results may be included in the Texas database.<sup>41</sup> Presumably, this would include DNA from paternity suits and civil suits.

Louisiana authorizes samples taken from anyone arrested for a felony, and Virginia requires that DNA samples be taken from arrestees for certain

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<sup>32</sup> Jan Bashinski, DNA Laboratory Monthly Statistics, <http://ag.ca.gov/bfs/pdf/Monthly.pdf> (last visited Feb. 14, 2009).

<sup>33</sup> Fed. Bureau of Investigation, NDIS Statistics for Texas, <http://www.fbi.gov/hq/lab/codis/tx.htm> (last visited Feb. 14, 2009).

<sup>34</sup> New York State Division of Criminal Justice Services, The NYS DNA Databank and CODIS, <http://criminaljustice.state.ny.us/forensic/dnabrochure.htm> (last visited Feb. 14, 2009).

<sup>35</sup> See Laura K. Donohue, *Proposition 69 Could Threaten Privacy of DNA*, S.F. CHRON., Aug. 22, 2004, at E-3, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/08/22/ING8689JT61.DTL>.

<sup>36</sup> CAL. PENAL CODE §§ 296(a)(2)(A)–(B), 296(a)(3) (West 2008).

<sup>37</sup> Complaint at 1, *Weber v. Lockyer*, 365 F. Supp. 2d 1119 (N.D.Cal. 2005) (No. 04-5161).

<sup>38</sup> CAL. PENAL CODE § 296(a)(2)(C).

<sup>39</sup> TEX. GOV'T CODE ANN. § 411.1471(a)(1)(A)–(I) (Vernon 2005 & Supp. 2008).

<sup>40</sup> TEX. GOV'T CODE ANN. § 411.142(g)(3) (Vernon 2005). Note that this language would include DNA collected surreptitiously, as has been done in a number of other jurisdictions. See Thompson, *supra* note 6; Richard Willing, *Police Dupe Suspects Into Giving Up DNA*, USA TODAY, Sept. 11, 2003, at A3.

<sup>41</sup> TEX. GOV'T CODE ANN. § 411.142(g)(4) (Vernon 2005).

violent felonies.<sup>42</sup> New Mexico<sup>43</sup> and Kansas<sup>44</sup> also authorize DNA samples from certain classes of arrestees. In addition to these statutes, a clear trend emerged in 2007 towards even greater inclusion of arrestee DNA into databases. Alaska, Arizona, Maryland, North Dakota, South Carolina, South Dakota, and Tennessee all enacted statutes requiring arrestee DNA sampling of some form.<sup>45</sup> The following table summarizes these statutes and their coverage:

State	Statute	Coverage
Alaska	Alaska Stat. § 44.41.035(b)(6)	Violent felonies
Arizona	Ariz. Rev. Stat. Ann. § 13-610(K)	Numerous serious felonies
California	Cal. Penal Code § 296(a)(2)(C)	All felonies
Kansas	Kan. Stat. Ann. §§ 21-2511(e)(1) and (2)	All felonies
Louisiana	La. Rev. Stat. Ann. § 15:609	All felonies
Maryland	Md. Code Ann. § 2-504	Crimes of violence and burglary
Minnesota	Minn. Stat. § 299C.105(1)	Certain felonies
New Mexico	New Mex. Stat. Ann. § 29-16-8.1(a)(5)	All felonies
North Dakota	N.D. Cent. Code § 31-13-03	All felonies, beginning July 31, 2009
South Carolina	S.C. Code Ann. § 23-3-620	All felonies

<sup>42</sup> LA. REV. STAT. ANN. § 15:609(A)(1) (2005); VA. CODE ANN. § 19.2-310.2:1 (2004). Louisiana, it is worth noting, is also the site of a particularly well-publicized DNA dragnet, in which police requested that citizens in a given town voluntarily submit to DNA testing to help police narrow down their suspects to those who refuse to submit to such tests. See Glynn Wilson, *In Louisiana, Debate Over a DNA Dragnet*, CHRISTIAN SCI. MONITOR, Feb. 21, 2003, at 3, available at <http://www.csmonitor.com/2003/0221/p03s01-usju.html>. For an explanation of how this has also occurred in other states such as Florida, see *supra* note 3 and accompanying text.

<sup>43</sup> N.M. STAT. ANN. § 29-16-8.1(a)(5) (LexisNexis 2007).

<sup>44</sup> KAN. STAT. ANN. § 21-2511(e)(1)-(2) (2007).

<sup>45</sup> ALASKA STAT. § 44.41.035(b)(6) (2007); ARIZ. REV. STAT. ANN. § 13-610(K) (2007); MD. CODE ANN. § 2-504; N.D. CENT. CODE § 31-13-03 (2007); S.C. CODE ANN. § 23-3-620; S.D. CODIFIED LAWS § 23-5A-5.2; TENN. CODE ANN. § 40-35-321(e)(1) (2007). The Tennessee law came despite an Opinion of the State Attorney General indicating that the law was "constitutionally suspect." Tenn. Atty Gen., Op. No. 07-45 (Apr. 9, 2007).

South Dakota	S.D. Codified Laws § 23-5A-5.2	Certain felonies, crimes of violence, and sex offenses
Tennessee	Tenn. Code Ann. § 40-35-321(e)(1)	Violent felonies
Texas	Tex. Gov't Code Ann. § 411.1471	Certain sex crimes and felonies, post-indictment only or arrestees with certain prior convictions
Virginia	Va. Code Ann. § 19.2-310.2:1	Violent felonies

Additionally, no fewer than forty-two other bills relating to DNA collection from arrestees were proposed in state legislatures across the country in 2007, and another 57 were proposed in 2008.<sup>46</sup> While many of these bills failed to make it out of committee, they serve as a clear indication of what is to come in 2009 and beyond. Many challenges to state laws authorizing DNA samples from *convicted* persons have been brought—and been rejected—but it is only within the last year or two that decisions on the constitutionality of arrestee DNA sampling have begun to emerge. The courts rejecting challenges to conviction based DNA sampling have not yielded consistent rationales for the constitutionality of such sampling. As a result, the challenges that will inevitably be brought to many of the arrestee DNA sampling statutes mentioned above will likely present greater challenges to courts. The next Part of this Note provides an overview of Fourth Amendment case law relevant to these statutes and examines the challenges that have been brought to DNA collection statutes by convicted and arrested persons.

### III. FOURTH AMENDMENT CHALLENGES

Legal challenges to the use of DNA databases mounted during the 1990s. Challenges have been brought under the Equal Protection Clause of the Fourteenth Amendment, the Ex Post Facto Clause, the Cruel and Unusual Punishment Clause of the Eighth Amendment, and the Due Process Clause, as well as on grounds of separation of powers.<sup>47</sup> The most common and

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<sup>46</sup> Gordon Thomas Honeywell Governmental Affairs, 2007 DNA Database Expansion Legislation (2007), *available at* <http://www.dnaresource.com/documents/2007DNAExpansionLegislation.pdf> and <http://www.dnaresource.com/documents/2008DNAExpansionLegislation.pdf>.

<sup>47</sup> See Mark A. Rothstein & Sandra Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 BROOK. L. REV. 127, 146–51 (2001).

widely discussed grounds for challenging mandatory DNA sampling, however, have come under the Fourth Amendment's prohibition of unreasonable searches and seizures. To understand these challenges, a brief overview of relevant Fourth Amendment jurisprudence is helpful. With this basis, it can be seen that two approaches to the justification of these statutes have emerged: the general "totality of the circumstances" approach and the "special needs" approach.

### A. A Brief Overview of Relevant Fourth Amendment Jurisprudence

The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>48</sup>

The modern approach to the prohibition of unreasonable searches and seizures has been laid out in Justice Harlan's concurrence in *Katz v. United States*.<sup>49</sup> According to Justice Harlan, a search occurs if a person has a reasonable expectation of privacy in the place searched and that expectation is one that society is prepared to recognize as reasonable.<sup>50</sup> Of particular importance here, the Supreme Court has held that taking and testing blood constitutes two separate searches, both of which implicate an individual's expectation of privacy.<sup>51</sup> With respect to the taking of blood, the Court has held that it is a "severe, though brief, intrusion upon cherished personal security" that is subject to constitutional scrutiny.<sup>52</sup> While the Supreme Court has not specifically addressed the constitutionality of taking a DNA sample from a person through a mouth swab or blood sample, a few previous cases give guidance. In particular, in *Schmerber v. California*,<sup>53</sup> the Court held that taking a blood sample was an intrusion into the body and required

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<sup>48</sup> U.S. CONST. amend. IV.

<sup>49</sup> 389 U.S. 347 (1967) (Harlan, J., concurring). *Katz* involved an electronic listening device attached to the outside of a phone booth. In addition to the rule laid out in Justice Harlan's concurrence, the case is remembered for the now famous statement that "the Fourth Amendment protects people, not places." *Id.* at 351. This phrase takes on new relevance with the advent of the many forms of DNA collection statutes at issue here.

<sup>50</sup> *Id.* at 361 (Harlan, J., concurring).

<sup>51</sup> *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989).

<sup>52</sup> *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (citing *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968)).

<sup>53</sup> 384 U.S. 757 (1966).

“a clear indication that in fact such [suspected] evidence will be found.”<sup>54</sup> The heightened probable cause requirement of *Schmerber* was reiterated in 1985 in *Winston v. Lee*,<sup>55</sup> in which the Court held, regarding the involuntary extraction of a bullet out of a suspect’s body, “when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search ‘reasonable.’”<sup>56</sup>

In addition to the extraction of biological samples, the *analysis* of that sample is also a search under the Fourth Amendment.<sup>57</sup> In *Skinner*, the “host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic,” that would be revealed in an analysis of a urine sample made it a search subject to the Fourth Amendment.<sup>58</sup> Analysis of urine samples was again held to constitute a search in *Ferguson v. City of Charleston*.<sup>59</sup> Because the collection of DNA is physically intrusive and its analysis reveals information far more private than urine, all circuit courts that have addressed the issue have concluded that forcible DNA collection is a search under the Fourth Amendment.<sup>60</sup>

Once one has concluded that a search has occurred, it must be supported by probable cause, which is determined by asking whether a specific item subject to seizure will be found in a particular area based on well-supported facts and circumstances within an officer’s personal knowledge.<sup>61</sup> The modern test for determining probable cause has been set out by the Supreme Court in *Illinois v. Gates*.<sup>62</sup> Under *Gates*, probable cause is to be determined

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<sup>54</sup> *Id.* at 770.

<sup>55</sup> 470 U.S. 753 (1985).

<sup>56</sup> *Id.* at 767.

<sup>57</sup> See *Skinner*, 489 U.S. at 616.

<sup>58</sup> *Id.* at 617. As mentioned above, DNA holds the ability to tell far more about an individual than mere urinalysis. Propensities for disease, phenotypic details such as hair color and eye color, and perhaps even behavioral characteristics can be identified through the examination of an individual’s DNA. See *supra* note 10 and accompanying text.

<sup>59</sup> 532 U.S. 67, 76 (2001).

<sup>60</sup> *Johnson v. Quander*, 440 F.3d 489, 493 (D.C. Cir. 2006); *Nicholas v. Goord*, 430 F.3d 652, 658 (2d Cir. 2005); *United States v. Sczubelek*, 402 F.3d 175, 182 (3d Cir. 2005); *Padgett v. Donald*, 401 F.3d 1273, 1277 (11th Cir. 2005); *Groceman v. U.S. Dep’t of Justice*, 354 F.3d 411, 413 (5th Cir. 2004) (per curiam); *Green v. Berge*, 354 F.3d 675, 676–77 (7th Cir. 2004); *United States v. Kincade*, 379 F.3d 813, 821 (9th Cir. 2004); *United States v. Kimler*, 335 F.3d 1132, 1146 (10th Cir. 2003); *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992).

<sup>61</sup> *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949).

<sup>62</sup> 462 U.S. 213 (1983). A number of states still apply the two-prong test set out in *Aguilar v. Texas*, 378 U.S. 108, 114 (1964), that was replaced by *Gates*, however. This test asks whether the information said to constitute probable cause comes from an

by the “totality-of-the-circumstances analysis that traditionally has informed probable cause determinations.”<sup>63</sup> In this analysis, one must consider the basis of knowledge of the person supplying the information and whether that information itself is trustworthy, among other factors, but inadequacies in one may be made up for by additional indicia of reliability in the other.<sup>64</sup> Thus, there are no hard and fast requirements in the determination of probable cause.<sup>65</sup>

The most relevant exception to these circumstances is the “special needs” test first announced in *New Jersey v. T.L.O.*<sup>66</sup> In this context, a search may be conducted without a warrant *or* probable cause—or in some circumstances even reasonable suspicion—due to “special needs, beyond the normal need for law enforcement.”<sup>67</sup> Examples of situations in which this exception applies are school searches,<sup>68</sup> searches of public employees<sup>69</sup> and probationers,<sup>70</sup> and certain instances of drug testing.<sup>71</sup> The exception does have limits, however. In *City of Indianapolis v. Edmond*,<sup>72</sup> the Court disapproved of a narcotics interdiction checkpoint set up as a roadblock. The Court distinguished this type of suspicionless search from one approved in *Michigan Department of State Police v. Sitz*,<sup>73</sup> which involved sobriety interdiction checkpoints, on the grounds that *Sitz* did not have a *primary* purpose of “detect[ing] evidence of ordinary criminal wrongdoing.”<sup>74</sup>

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individual with a reliable basis of knowledge and whether the information itself is reliable. *Aguilar*, 378 U.S. at 114. See *State v. Jones*, 706 P.2d 317, 321–22 (Alaska 1985); *Commonwealth v. Upton*, 476 N.E.2d 548, 556–57 (Mass. 1985); *State v. Cordova*, 784 P.2d 30, 33 (N.M. 1989); *People v. Griminger*, 524 N.E.2d 409, 410 (N.Y. 1988); *State v. Jackson*, 688 P.2d 136, 138–39 (Wash. 1984).

<sup>63</sup> 462 U.S. at 238.

<sup>64</sup> *Id.* at 230.

<sup>65</sup> As a result, the totality of the circumstances approach has been criticized for setting too low of a standard for police conduct. See, e.g., Wayne R. LaFare, *The Fourth Amendment Today: A Bicentennial Appraisal*, 32 VILL. L. REV. 1061, 1065–70 (1987).

<sup>66</sup> 469 U.S. 325, 341 (1985).

<sup>67</sup> *Id.* at 351 (Blackmun, J., concurring).

<sup>68</sup> *Id.*

<sup>69</sup> *O'Connor v. Ortega*, 480 U.S. 709, 725 (1987).

<sup>70</sup> *Griffin v. Wisconsin*, 483 U.S. 868, 873–74 (1987).

<sup>71</sup> *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 634 (1989) (public employees); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 664 (1989) (same); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 664–65 (1995) (public school students).

<sup>72</sup> 531 U.S. 32, 40–42 (2000).

<sup>73</sup> 496 U.S. 444, 447 (1990).

<sup>74</sup> *Edmond*, 531 U.S. at 38.

This distinction was further developed in *City of Charleston v. Ferguson*, in which procedures used by a hospital, in conjunction with police, to identify expectant mothers who had used drugs were declared to be in violation of the Fourth Amendment.<sup>75</sup> Maternity patients were required to submit to a urinalysis test, and if the tests came back positive for drugs, they were given to police for prosecution.<sup>76</sup> The Court, in an opinion written by Justice Stevens, struck the program down because:

While the ultimate goal of the program may well have been to get the women in question into substance abuse treatment and off of drugs, the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal. The threat of law enforcement may ultimately have been intended as a means to an end, but the direct and primary purpose of MUSC's policy was to ensure the use of those means. In our opinion, this distinction is critical.<sup>77</sup>

Thus, the "special needs" exception cannot justify police actions taken for "general law enforcement" purposes. The Court has not, however, discussed precisely how a primary purpose of detecting evidence of "ordinary criminal wrongdoing" should be found in light of other alleged primary purposes. Additionally, that there is an impermissible purpose at all seems to conflict with the Court's general distaste for inquiring into the subjective intent of police officers, as well.<sup>78</sup> As a result, while the "special needs" exception to the warrant and probable cause requirements of the Fourth Amendment is arguably unavailable to justify DNA collection statutes in light of the statements made in *Edmond* and *Ferguson*, the open-ended nature of the doctrine does not make this conclusively the case. The circuit courts considering such statutes are good examples of this debate.

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<sup>75</sup> 532 U.S. 67, 84 (2001).

<sup>76</sup> *Id.* at 72–73.

<sup>77</sup> *Id.* at 82–84 (citations omitted).

<sup>78</sup> See *Whren v. United States*, 517 U.S. 806, 812–13 (1996). It has been suggested that the Court's refusal to inquire into the subjective intent of police officers has led to increased distrust of the police, particularly among groups of African-Americans. See Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 340 (1998) (arguing that the Court should take into account the potential racial impact of its rulings). Indeed, some scholars have noted that *Whren* itself was decided on grounds improperly and unnaturally detached from the racial aspects of the case. Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 1012 (1999). That said, the fact that *Whren* was a unanimous decision does suggest that the stark split made in *Edmond* and *Ferguson* will at some point be addressed. Perhaps the Court's openness to subjective intent inquiries in the context of "special needs" searches is a reaction to the perceived troubles brought by an approach to the Fourth Amendment that completely ignores subjective intent.

*B. Two Approaches Emerge for DNA Collection Statutes: "Special Needs" and the "Totality of the Circumstances"*

In addition to the "special needs" exception, another approach to DNA collection statutes is to apply the standard "totality of the circumstances" rule, where a court looks for reasons why the particular individual or class of individuals affected simply does not have an expectation of privacy sufficient to outweigh the government interest in collecting the DNA and thereby warrant Fourth Amendment protection. As it happens, these are the two main ways in which courts have upheld DNA collection statutes against Fourth Amendment attacks. While a number of Circuit Courts have issued opinions along these lines,<sup>79</sup> the rationales and the differences between them can be best understood by evaluating three key opinions: *United States v. Kincade*<sup>80</sup> from the Ninth Circuit, *Nicholas v. Goord*<sup>81</sup> from the Second Circuit, and *United States v. Stewart*<sup>82</sup> from the District of Massachusetts. Several cases considering arrestee DNA collection statutes are then worth discussing.

*1. Kincade, Goord, and Stewart: Contrasting Approaches to DNA Sampling of Convicted Persons*

At the heart of the debate over how to analyze DNA database statutes lie questions over the role that individualized suspicion is to play in police investigations and the difficulty of finding solid ground in the midst of what some have called a slippery slope towards the evisceration of the Fourth Amendment.<sup>83</sup> These two questions are implicated by DNA database statutes by virtue of the fact that DNA collection and its retention in databases can be enormously helpful in investigating future crimes, but the degree to which it actually is helpful is dependent on the inclusion in the database of as many people as possible. Thus, the incentive to include is not necessarily satiated by voluntary donation or mandatory donation from those whom we reasonably suspect of wrongdoing, but can extend to the forcible collection from those whom we do not suspect of committing a crime. One main reason for this is that many of those crimes we seek to aid with databases are those that have not yet been committed—the DNA is sought for the purpose of

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<sup>79</sup> See *supra* note 9 and accompanying text.

<sup>80</sup> 379 F.3d 813 (9th Cir. 2004) (en banc).

<sup>81</sup> 430 F.3d 652 (2d Cir. 2005).

<sup>82</sup> 468 F. Supp. 2d 261 (D. Mass. 2007), *rev'd*, 532 F.3d 32 (1st Cir. 2008).

<sup>83</sup> See, e.g., Kathryn Zunno, Comment, *United States v. Kincade and the Constitutionality of the Federal DNA Act: Why We'll Need a New Pair of Genes to Wear Down the Slippery Slope*, 79 ST. JOHN'S L. REV. 769 (2005).



having it on file in case the donor commits a crime in the future.<sup>84</sup> Among the most notable cases struggling with the role of individual suspicion and the limits of what actions are permitted in the absence of individual suspicion is that of *United States v. Kincade*,<sup>85</sup> decided *en banc* by the Ninth Circuit in 2004.

“On July 20, 1993, driven by escalating personal and financial troubles, decorated Navy seaman Thomas Cameron Kincade robbed a bank using a firearm in violation of [federal law]. He soon pleaded guilty . . . and was sentenced to 97 months’ imprisonment, followed by three years’ supervised release.”<sup>86</sup> His release was conditioned upon compliance with certain requirements, including that of following the commands of his probation officer, but he violated those requirements on a number of occasions by testing positive for cocaine.<sup>87</sup> After making demonstrable improvements in his life, Kincade was asked to submit to a DNA test by his probation officer on March 25, 2002, pursuant to the DNA Analysis Backlog Elimination Act of 2000.<sup>88</sup> Kincade refused and his probation officer ultimately informed the District Court of his refusal.<sup>89</sup> After the District Court rejected Kincade’s challenge that the DNA Backlog Act violated his Fourth Amendment rights, the Ninth Circuit reversed the District Court and took the extraordinary step of granting a rehearing *en banc*.<sup>90</sup> On August 18, 2004, the eleven-member *en banc* panel of the Ninth Circuit rejected Kincade’s contention, but did so without a majority rationale due to a 5-1-5 split, with five different opinions.<sup>91</sup>

Writing for the five judge plurality, Judge Diarmuid O’Scannlain applied the traditional “totality of the circumstances” test to the Act, but not without considering the alternative taken by many other courts: the “special needs” exception to the warrant and probable cause requirement, first enunciated in Justice Blackmun’s concurrence in *New Jersey v. T.L.O.* to permit searches in a school because of “special needs, beyond the normal need for law enforcement . . . .”<sup>92</sup> Judge O’Scannlain discussed the relationship of the “special needs” exception to law enforcement activities, noting that,

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<sup>84</sup> See *infra* note 177 and accompanying text.

<sup>85</sup> 379 F.3d 813 (9th Cir. 2004) (*en banc*) [*hereinafter Kincade en banc*].

<sup>86</sup> *Id.* at 820.

<sup>87</sup> *Id.*

<sup>88</sup> DNA Analysis Backlog Elimination Act of 2000, Pub. L. No. 106-546, 114 Stat. 2726 (2000).

<sup>89</sup> *Kincade en banc*, 379 F.3d at 820–21.

<sup>90</sup> *United States v. Kincade*, 354 F.3d 1000 (9th Cir. 2004) [*hereinafter Kincade I*].

<sup>91</sup> See *Kincade en banc*, 379 F.3d 813.

<sup>92</sup> 469 U.S. 325, 351 (1985).

“[a]lmost as soon as the ‘special needs’ rationale was articulated . . . the Court applied special needs analysis in what seemed—at least on the surface—to be a clear law enforcement context.”<sup>93</sup>

Ultimately, however, Judge O’Scannlain opted not to apply special needs analysis.<sup>94</sup> Instead, the plurality opted to follow a 1995 precedent of the Ninth Circuit that upheld a state DNA collection statute under the traditional “totality of the circumstances” approach, which calls for a person’s expectation of privacy to be balanced against the government’s interest in taking the contested action.<sup>95</sup>

Having thus selected the “totality of the circumstances” approach, the plurality began its analysis by noting that neither *Edmond* nor *Ferguson* condemned suspicionless searches outside the context of “special needs” and that, indeed, the distinction drawn in *Ferguson* between suspicionless searches of conditional releasees and the general public in the context of “special needs” analysis provided a “jurisprudentially sound analytic division” for the “totality of the circumstances” approach.<sup>96</sup> As for Kincade’s privacy interest, the plurality found it to be low, given the fact that blood tests are very common<sup>97</sup> and that, because he was a convicted felon on supervised release, the DNA profile provided identification information no more personal than other information requested for the same offense.<sup>98</sup>

In contrast, the plurality found the government interest in collecting the DNA samples to be “undeniably compelling.”<sup>99</sup> The need to discourage or deter recidivism is mentioned as a strong interest on a number of occasions.<sup>100</sup> Additionally, linking these releases to crimes committed while they are at large, ensuring that they adhere to the requirements of release, and “bring[ing] closure to countless victims of crime who long have languished in the knowledge that perpetrators remain at large” were found to constitute a “monumental” interest.<sup>101</sup>

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<sup>93</sup> *Kincade en banc*, 379 F.3d at 824.

<sup>94</sup> *Id.* at 831–32.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 832.

<sup>97</sup> *Id.* at 836.

<sup>98</sup> *Id.* at 837.

<sup>99</sup> *Kincade en banc*, 379 F.3d at 838.

<sup>100</sup> *Id.* at 833, 839. This description of the DNA Act’s purpose has been criticized. See Zunno, *supra* note 83, at 811. The author of this Comment argues that the legislative and executive branches clearly intended the primary purpose of the Act to be that of solving past and future crimes, given the statements made in the legislative history and by the Department of Justice. *Id.* at 811–14.

<sup>101</sup> *Kincade en banc*, 379 F.3d at 838–39.

The sixth, and crucial, vote in favor of upholding the Act came from Judge Ronald Gould. Judge Gould opted for the “special needs” approach due to what he felt was an important rule to be elucidated from *Ferguson* and *Griffin v. Wisconsin*,<sup>102</sup> which allowed warrantless searches of state parolees,<sup>103</sup> stating that “[t]he deterrent felt by a person on supervised release who must participate in the DNA program and the CODIS database serves the special needs of a supervised release system.”<sup>104</sup> Judge Gould distinguished this from the “general law enforcement” purpose ruled impermissible in *Ferguson* on the grounds that

the Supreme Court’s reluctance to apply special needs analysis to endorse warrantless searches aimed at general law enforcement cautions against applying this doctrine to general law enforcement aimed at past crime. It does not mean that special needs analysis cannot be applied to DNA collection from those on supervised release with the purposes to deter future crime . . . .<sup>105</sup>

The opinion then faults the dissent for focusing too much on facts that are not present in this case<sup>106</sup> and seeks to emphasize that this “special needs” approval does not focus on anyone other than a convicted felon on supervised release: “What we do not have before us is a petitioner who has fully paid his or her debt to society . . . and who has left the penal system.”<sup>107</sup> This, then, along with the surrounding language, seems to indicate that a case with slightly different facts—say, a person who has completed his or her term of supervised release seeking to expunge the record from CODIS—may well succeed in the eyes of Judge Gould.

Judge Stephen Reinhardt responded with a blistering dissent, joined by three other judges. Striking at the heart of the plurality’s claim that searches conducted without individualized suspicion could be permissible outside the “special needs” context, Judge Reinhardt emphasized that, “[n]ever has the Court approved of a search like the one we confront today: a programmatic search designed to produce and maintain evidence relating to ordinary

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<sup>102</sup> 483 U.S. 868 (1987).

<sup>103</sup> *Kincade en banc*, 379 F.3d at 840.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 841 n.2 (“Because circumstances that arise when a releasee has complete supervised release and is no longer in the criminal justice system are not now before us, we cannot definitively discuss the legality of the DNA Act beyond its immediate application to *Kincade* in the case now presented.”). This statement, contained in the opinion that ultimately upheld the Act, seems to undercut the precedential value of *Kincade* for cases involving arrestee statutes, as will be discussed below in Part IV.

<sup>107</sup> *Id.* at 841.

criminal wrongdoing . . . .”<sup>108</sup> After noting the “opaque” and “malleable” nature of the plurality’s “totality of the circumstances” approach<sup>109</sup> and a lengthy discussion of the history and expansion of DNA databases,<sup>110</sup> Judge Reinhardt focused his criticism on the abandonment of the principle requiring individual suspicion as a basic tenet of a reasonable Fourth Amendment search.<sup>111</sup> As for the “special needs” doctrine, Judge Reinhardt felt that it did supply the proper mode of analysis,<sup>112</sup> but disagreed with Judge Gould’s application, stating, “[a]lthough the ‘general interest in law enforcement’ does not refer to every law enforcement objective . . . valid special needs, as the Court most recently explained in [*Illinois v.*] *Lidster*,<sup>113</sup>

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<sup>108</sup> *Id.* at 843. Judge Reinhardt noted experiences from our recent history showing the dangers of unrestrained programmatic searches conducted without any individualized suspicion, including “J. Edgar Hoover terroriz[ing] leaders of the civil rights movement by exploiting the information he collected in his files,” as well as “[o]ur government’s surveillance and shameful harassment of suspected communists and alleged communist-sympathizers,” which resulted from centralized information often collected pursuant to violations of the Fourth Amendment, plus the Palmer Raids and Japanese Internment Camps of World War II. *Id.* An additional problem is the sheer size of the bureaucracy created by DNA databases, which may lead to inaccuracies or abuse. *Id.* In such a bureaucracy, human error can lead to mistakes with grave consequences. Robert A. Perry, Op-Ed., *DNA Database Is Not an Exact Science*, ALBANY TIMES-UNION, June 18, 2007, available at <http://www.nyclu.org/node/1307>. Perry, who is legislative director of the New York Civil Liberties Union, notes that New York’s Commission of Investigation found that sufficient qualified analysts were lacking in the system and that an enormous backlog of samples needed to be analyzed may require outsourcing. *Id.*

<sup>109</sup> *Kincade en banc*, 379 F.3d at 844.

<sup>110</sup> *Id.* at 845–51. In particular, Judge Reinhardt noted the sheer breadth of offenses that qualify one for forcible DNA collection, which includes “tearing apart a \$1 bill in protest against a perceived arbitrary governmental policy,” cutting the buoy rope of a boat belonging to another, and “interference with or intimidation of federal meat, poultry, or poultry products inspectors,” among others. *Id.* at 846–47 (citations omitted).

<sup>111</sup> *Id.* at 852. Both ancient and recent sources are cited in support of this. The Virginia Declaration of Rights of 1776 provided, “[t]hat general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.” *Id.* The Supreme Court recently emphasized the importance of individualized suspicion in upholding *Brown v. Texas*, 443 U.S. 47 (1979), which ruled unconstitutional requirements to provide identification to police officers without reasonable suspicion. *Kincade en banc*, 379 F.3d at 853 n.10 (citing *Hübel v. Sixth Judicial Dist. Court*, 542 U.S. 177 (2004)).

<sup>112</sup> *Kincade en banc*, 379 F.3d at 863.

<sup>113</sup> 540 U.S. 419 (2004). *Lidster* involved a road checkpoint in which the police sought information from individuals about a fatal hit-and-run that had occurred at that location a week prior. The Court in *Lidster* distinguished *Edmond* on the grounds that,

may not include efforts to obtain information related to possible crimes that the searched individual may have committed.”<sup>114</sup>

The second dissent, authored by Judge Alex Kozinski, noted that if the purpose of taking DNA samples to help solve crimes later is a justifiable way of getting around the Fourth Amendment, then a law forcing those who have paid their debts to society, or indeed, who had never been in debt to society, could be legitimized under the same rationale.<sup>115</sup> Judge Kozinski then sought to refocus the Fourth Amendment issue present in this case away from the physically intrusive nature of the taking of the blood sample and onto the “seizure of the DNA fingerprint and its inclusion in a searchable database.”<sup>116</sup> Rejecting the plurality and Judge Gould’s concern that consideration should be limited to the facts at hand, Judge Kozinski presciently argued that the expansion of DNA database laws is a virtual certainty and that this requires checks be set in place soon, since “[n]ot only do [Fourth Amendment opinions] reflect today’s values by giving effect to people’s reasonable expectations of privacy, they also shape future values by changing our experience and altering what we come to expect from our government.”<sup>117</sup> In the end, Judge Kozinski felt that, applying the plurality’s test, “it’s hard to see how we can keep the database from expanding to include everybody. . . . I’m hard pressed to see how [the plurality’s test] would violate anyone’s Fourth Amendment rights.”<sup>118</sup>

Thus, a majority of the panel agreed that the “special needs” doctrine should be applied, but a different majority agreed on the constitutionality of the Act, with resulting opinions that stand in contrast to another notable—and unanimous—opinion from the Second Circuit.

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“[t]he stop’s primary law enforcement purpose was *not* to determine whether a vehicle’s occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others.” *Id.* at 423. But could the familial similarities in DNA, *see supra* note 17 and accompanying text, justify asking one individual for DNA not for the information it may provide about that person’s involvement in crime, but rather on any relatives’ involvement in crime? Common sense seems to suggest that the answer is “no,” but the language itself does not seem to foreclose this possibility.

<sup>114</sup> *Kincade en banc*, 379 F.3d at 854.

<sup>115</sup> *Id.* at 872. Judge Kozinski succinctly summarized the plurality’s rationale as follows: “We have a pretty good idea that people who have committed crimes in the past are more likely than others to commit crimes in the future. It is thus very, very, very useful for us to get their DNA fingerprints now so we can use them later to investigate crimes.” *Id.*

<sup>116</sup> *Id.* at 873.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 872.

In *Nicholas v. Goord*,<sup>119</sup> convicted felons challenged New York's statute requiring the taking of DNA samples from certain classes of convicted felons in a suit under 42 U.S.C. § 1983.<sup>120</sup> Judge John M. Walker was confronted with the same question as the *Kincade* court: whether to apply the traditional "totality of the circumstances" approach or the "special needs" doctrine. The majority rejected the approach taken by many of the courts opting for the "totality of the circumstances" test, which have cited *United States v. Knights*<sup>121</sup> as support for this approach to DNA sampling statutes. In *Knights*, the Supreme Court upheld the search of a probationer under the "totality of the circumstances" approach, but, Judge Walker argues, it did not do so to indicate that all searches of a probationer should be considered regardless of whether individualized suspicion exists.<sup>122</sup> Indeed, "we think it telling that the Court emphasized, from the very first paragraph of its opinion, that the search of *Knights*'s apartment was 'supported by reasonable suspicion.'"<sup>123</sup>

With this, the majority opted for the "special needs" approach, but departed from the *Kincade* opinion yet again in doing so. While Judge Gould found the "special need" in *Kincade* to be that of administering the supervisory release program,<sup>124</sup> this option was not available to Judge Walker because of the simple fact that the plaintiffs here had been forced to give their samples while still in prison. Instead, the majority found the primary purpose of the statute to be "to create a DNA database to assist in solving crimes should the investigation of such crimes permit resort to DNA testing of evidence."<sup>125</sup> Support for this was said to come from the distinction in *Lidster* approving of "special needs" searches when done for the purpose of "information seeking" as opposed to those which are simply looking for

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<sup>119</sup> 430 F.3d 652 (2d Cir. 2005).

<sup>120</sup> *Id.* at 655–56. In particular, the plaintiffs sought to have their DNA expunged from New York's database—against the statute's requirement that this only be done if a conviction is reversed or a pardon is granted—and money damages. *Id.* at 656. It is also worth noting that although the plaintiffs' DNA was taken pursuant to a blood sample, the statute was amended in 1999 to allow sampling from methods other than blood sampling and the state maintained that their "current normal practice" is to take DNA through a swab of the inside of an individual's cheek. *Id.* at 656 n.5. The court in *Goord* stated that its analysis was to be confined to taking DNA through blood sample, though it cited *Skinner* for the proposition that "even less intrusive measures . . . such as cheek swabs, can constitute a search," since the analysis of the sample also implicates privacy interests. *Id.* (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989)).

<sup>121</sup> 534 U.S. 112 (2001).

<sup>122</sup> *Goord*, 430 F.3d at 665.

<sup>123</sup> *Id.* (citation omitted).

<sup>124</sup> See *supra* notes 105–106 and accompanying text.

<sup>125</sup> *Goord*, 430 F.3d at 668.

evidence of “ordinary criminal wrongdoing.”<sup>126</sup> Thus, Judge Walker drew a distinction in the “special needs” doctrine within the context of law enforcement. From here, Judge Walker characterized the prisoners’ privacy interests as low due to the fact that the drawing of blood was minimally intrusive and because the statute, as written, does not pose a threat of exposing more personal information.<sup>127</sup> The end result is the same as in *Kincade*: New York’s statute requiring DNA sampling from prisoners was upheld.

The end result was not the same in a case decided on January 8, 2007 in the District of Massachusetts. In *United States v. Stewart*,<sup>128</sup> a probationer sought to prevent the United States Probation Department from obtaining a DNA sample pursuant to the DNA Analysis Backlog Elimination Act of 2000. After stating the standard understanding of the relevant Fourth Amendment case law, the court began to examine the statute under the general “totality of the circumstances” balancing test with a very common sense statement: “[t]he outcome of the balancing is largely determined by how the two weights in the balance are characterized.”<sup>129</sup> As for the governmental interest, Judge William G. Young noted three possibilities raised by previous cases involving probationers and DNA collection statutes: “a general supervisory interest in probationers[], prevention of recidivism through deterrence[], and the development and maintenance of a DNA database to assist in the solving of past and prospective crimes[]”<sup>130</sup>

From here, Judge Young noted the traditional importance of the individualized suspicion requirement, but drew an analogy from the “special needs” context to the probationer context to explain why, even under the general “totality of the circumstances” test, individualized suspicion may be less of a requirement.<sup>131</sup> “In the context of a search of persons released yet under continuing supervision, the Supreme Court has *relaxed the traditional safeguards*.”<sup>132</sup> That said, the Court found the “general supervisory interest in probationers” insufficient because, unlike previous cases involving

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 670.

<sup>128</sup> 468 F. Supp. 2d 261 (D. Mass. 2007).

<sup>129</sup> *Id.* at 269.

<sup>130</sup> *Id.* at 269–70 (citing *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987) (general supervisory interest); *see also* *United States v. Kincade*, 379 F.3d 813, 838–39 (9th Cir. 2004) (prevention of recidivism through deterrence); *Goord*, 430 F.3d at 668 (use of DNA database)).

<sup>131</sup> *Stewart*, 468 F. Supp. 2d at 270–71.

<sup>132</sup> *Id.* at 271 (citing *Samson v. California*, 547 U.S. 843 (2006)) (emphasis added). In *Samson*, the Court upheld warrantless, suspicionless searches of parolees because of the government’s interest in preventing a return to crime. 547 U.S. at 854.

probationers, “a probationer cannot take any action to thwart or conceal the information contained in his DNA” and the DNA does not show wrongdoing immediately, it must be taken back to a laboratory and analyzed.<sup>133</sup> Thus, “[t]here is no reason why a probation officer who suspects ongoing criminal activity could not take the reasonable time to secure a warrant for DNA collection without fear that the information he seeks would be destroyed or concealed.”<sup>134</sup>

Judge Young then rejected the second governmental interest: prevention of recidivism through deterrence. Specifically, if the theory behind this interest is that individuals who have given their DNA will take this fact into account when contemplating a future crime because they will likely leave DNA behind during its commission, Judge Young found it “speculative at best” and too reliant on unsupportable inferences.<sup>135</sup> This is especially evident given the crime Stewart was charged with: unlawfully diverting Social Security benefits, in which DNA plays *no role* in its investigation or prosecution.<sup>136</sup>

Lastly, Judge Young found the third governmental interest insufficient as well. While building a large, federal database may be a very powerful tool in solving crime, it should not be given too much weight when samples are sought through suspicionless searches.<sup>137</sup> It is true, Judge Young noted, that Stewart’s status as a probationer diminishes his expectation of privacy, but, “[t]he government cannot . . . also use this probationary status to increase the importance of the governmental purpose served by the search.”<sup>138</sup>

As for Stewart’s expectation of privacy, his status as a probationer certainly meant that he had fewer liberties than fully free individuals, but Judge Young distinguished this case from *Goord* and others on the grounds that Stewart had never served any jail time.<sup>139</sup> The lack of jail time and the

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<sup>133</sup> *Stewart*, 468 F. Supp. 2d at 272.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* Indeed, as Judge Reinhardt noted in *Kincade*, the law requires DNA collection for, among other things, intimidation of a federal poultry inspection officer. See *supra* note 110 and accompanying text. One can imagine such intimidation occurring through means guaranteeing that the perpetrator would leave behind no DNA, thus making the previous inclusion of that person’s DNA in a database no deterrent to groups targeted by this law, such as PETA. See generally, R. Emmett Tyrrell, *Tyrrell: Animal Rights Nonsense*, CNN.COM, April 20, 2006, <http://www.cnn.com/2006/POLITICS/04/20/tyrrell.peta/index.html>.

<sup>137</sup> *Stewart*, 468 F. Supp. 2d at 273.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 275 (“On the punishment continuum . . . incarceration places the prisoner at the lowest degree of any expectation of privacy. This diminished expectation of



suspicionless and warrantless nature of the search undermine the notion that physical intrusiveness can be significantly minimized.<sup>140</sup> Additionally, the chemical analysis of the sample is an even greater intrusion because it contains information so personal and revealing.<sup>141</sup> The court discussed this aspect of the balancing test in much greater detail.

The court seemed conflicted by statements made by the Supreme Court indicating that probationers have a reduced expectation of privacy yet still retain some rights.<sup>142</sup> Additionally, the Court has noted that probationers have greater rights than prisoners, parolees, and those on supervised release.<sup>143</sup> Judge Young wondered, if there are *any* rights held by probationers, it is hard to see what they could be if they are not implicated in this case.<sup>144</sup> Further, Judge Young felt that in a world in which more and more private information is becoming exposed to the public, thereby reducing the expectations of privacy relevant to Fourth Amendment inquiries, some resistance was necessary.<sup>145</sup> This case is a perfect example, because “[h]ere, the segment of society that the government seeks to search is in no way marginal.”<sup>146</sup> Allowing the government to take DNA samples from probationers would, Judge Young felt, lead our country further down the slippery slope towards abuse of the information contained in those samples.<sup>147</sup> For example, the court noted that while Social Security numbers were first intended to aid the disbursement of retirement benefits, they have subsequently come to serve as a universal identification number.<sup>148</sup> In addition, census records were used to help fill Japanese Internment Camps during World War II.<sup>149</sup> And lastly,

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privacy arises from having no Fourth Amendment rights in their prison cells, and from the continual need ‘to expose their body cavities for visual inspection as a part of a strip search conducted after every contact visit with a person from outside the institution . . . .’”) (internal citations omitted).

<sup>140</sup> *Id.* at 277.

<sup>141</sup> *Id.* at 277–78 (citing *Kincade en banc*, 379 F.3d at 849–850 (Reinhardt, J., dissenting)).

<sup>142</sup> *Stewart*, 468 F. Supp. 2d at 278.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 278–79.

<sup>146</sup> *Id.* at 279 (“[O]ne out of every forty-two Americans—over seven million persons—are either in prison, on parole, or on probation. . . . In light of such statistics, the scope and effect of such a search regime is staggering.”) (citations omitted).

<sup>147</sup> *Id.* at 279–80.

<sup>148</sup> *Stewart*, 468 F. Supp. 2d at 280.

<sup>149</sup> *Id.*; see also *supra* note 108 and accompanying text.

two National Security Agency intelligence collection programs . . . operated during the Cold War, began with the narrow purpose of exploiting foreign intelligence for national security purposes. Soon, both programs expanded past this initial purpose and turned the awesome power of its collection capabilities and data-mining against American citizens and domestic terminals.<sup>150</sup>

As a result, the court believed that it was necessary to safeguard against the slippery slope and hold the Act unconstitutional.<sup>151</sup>

Thus, the court in *Stewart* agreed with the *Kincade* plurality that the “totality of the circumstances” approach should be employed, but disagreed sharply as to its application. The different discussions and opinions stated in *Kincade*, *Goord*, and *Stewart* regarding the “totality of the circumstances” and “special needs” tests cannot always neatly be applied in the context of arrestee DNA collection statutes, however, as the following cases show.

## 2. *New Horizons: Challenges to Statutes Requiring DNA from Arrestees*

The expansion of DNA database laws to cover arrestees poses new challenges to the rationales employed in the cases discussed above. As a result, it has been questioned whether such arrestee statutes would be able to survive the challenges that inevitably emerge.<sup>152</sup> Alternative exceptions to the warrant and probable cause requirements have also been suggested.<sup>153</sup> As the

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<sup>150</sup> 468 F. Supp. 2d at 280. Programs such as this may not have been left behind in the Cold War. Federal authorities are planning a “one-stop shop” for law enforcement authorities seeking information related to terrorism prevention comprised of links formed through a Justice Department network called National Data Exchange. Robert O’Harrow, Jr. and Ellen Nakashima, *National Dragnet is a Click Away*, WASH. POST, Mar. 6, 2008, at A1; see also Ellen Nakashima, *FBI Prepares Vast Database of Biometrics*, WASH. POST, Dec. 22, 2007, at A1.

<sup>151</sup> *Stewart*, 468 F. Supp. 2d at 281–82, rev’d, 532 F.3d 32 (1st Cir. 2008).

<sup>152</sup> See Maclin, *supra* note 19. One of the lawyers who litigated *Ferguson* before the Supreme Court argues that courts applying the “special needs” exception to DNA collection statutes have done more harm to the Fourth Amendment than good. Julie Rikelman, *Justifying Forcible DNA Testing Schemes Under the Special Needs Exception to the Fourth Amendment: A Dangerous Precedent*, 59 BAYLOR L. REV. 41, 75–76 (2007).

<sup>153</sup> David H. Kaye, *Who Needs Special Needs? On the Constitutionality of Collecting DNA and Other Biometric Data from Arrestees*, 34 J. L. MED. & ETHICS 188, 192–93 (2006) (suggesting a “biometric identification” exception to the warrant requirement); Paul M. Monteloni, Note, *DNA Databases, Universality, and the Fourth Amendment*, 82 N.Y.U. L. REV. 247, 247 (2007) (urging a “universality exception” to the

shift towards inclusion of arrestees into DNA database statutes becomes more well known, particularly with the federal DNA Fingerprint Act of 2005, it is virtually certain that legal challenges will be brought. The first of these have just started to emerge, with the result that one statute has been struck down by a Minnesota appellate court while another has been upheld by the Virginia Supreme Court. These cases deserve some attention.

The first such case was delivered on October 10, 2006, by the Minnesota Court of Appeals. That case, *In re Welfare of C.T.L., Juvenile*,<sup>154</sup> involved a juvenile who had been charged with fifth-degree assault and aiding and abetting first-degree aggravated robbery.<sup>155</sup> Upon an attempt by the state to obtain an order from the trial court requiring the defendant to provide a DNA sample, the defendant sought an order finding that the statute requiring these samples violated the Fourth Amendment and the Minnesota Constitution.<sup>156</sup> Thus, the Minnesota Court of Appeals was faced squarely with a question that had never been presented in any of the cases upholding DNA databases: "Do the portions of [the Minnesota statute] that direct law-enforcement personnel to take a biological specimen from a person who has been charged with an offense, but not convicted, violate the Fourth Amendment . . . ?"<sup>157</sup> The court answered in the affirmative.

The court began by noting that the statute in question applies not only to juveniles, but to all persons arrested for the enumerated offenses, and that expungement of the records is required if no conviction results.<sup>158</sup> From here, the court acknowledged the implications of the physically intrusive nature of the method to obtain the DNA sample.<sup>159</sup> While the court did not indicate whether it was by buccal swab or blood sample, it cited *Skinner v. Ry. Labor Executives' Ass'n*,<sup>160</sup> for the proposition that "the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches."<sup>161</sup> In a further indication that the physical intrusiveness of the sample would be an important factor in its consideration of the law, the court discussed, at length, *Schmerber v. California*,<sup>162</sup> which

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warrant requirement making a search reasonable if it "is authorized by a statute that truly applies equally to every member of the population.").

<sup>154</sup> 722 N.W.2d 484 (Minn. Ct. App. 2006).

<sup>155</sup> *Id.* at 486.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 488.

<sup>159</sup> *Id.* at 488–89.

<sup>160</sup> 489 U.S. 602 (1989)

<sup>161</sup> *C.T.L.*, 722 N.W.2d at 488 (quoting *Skinner*, 489 U.S. at 618).

<sup>162</sup> 384 U.S. 757 (1966).

involved the unconsented taking of a blood sample from a person who had recently been in an automobile collision for the purpose of determining whether the person had been intoxicated at the time of the crash.<sup>163</sup>

The purpose of this discussion was to reject one argument that had been made to justify the taking of the DNA sample: that the finding by a judge that probable cause existed to *arrest* the defendant was sufficient to justify the sampling. Not so, said the court, because “just as in *Schmerber* . . . a determination of probable cause to support a criminal charge, even if it is made by a judge, is not sufficient to permit a biological specimen to be taken from the person charged without a warrant.”<sup>164</sup>

The court then rejected the state’s second argument: that the “totality of the circumstances” approach adopted by other courts in the context of convicted felons applies with equal force in the context of arrestees. The court distinguished these cases on the grounds that, in the course of the balancing test conducted by the other courts, the reduced expectation of privacy of convicted persons is outweighed by the state’s interest in collecting DNA samples.<sup>165</sup> Because arrestees have not yet been convicted of the crime for which they have been arrested, “the reduced expectation of privacy that was present in the cases the state cites is not present here.”<sup>166</sup> That the expectation of privacy of arrestees has not been reduced by arrest is further evidenced, the court claimed, by the fact that the statute mandates the DNA records be expunged if no conviction results from the arrest.<sup>167</sup> What is more, the court explained:

[B]ecause a person who has been charged is presumed innocent until proved guilty, we see no basis for concluding that before being convicted, a charged person’s privacy expectation is different from the privacy expectation of a person who was charged but the charge was dismissed or the person was found not guilty.<sup>168</sup>

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<sup>163</sup> *C.T.L.*, 722 N.W.2d at 488–89. The Minnesota Court noted that the reason the blood sample could be obtained in *Schmerber* was not simply because there was likely alcohol in the blood, but because the alcohol could disappear, leaving no evidence of the suspected crime. *Id.* at 490. Thus, by way of analogy to DNA, the court seems to say that the fact that we know DNA contains information that will identify the individual should not be sufficient, on its own, to support a finding of probable cause—there must be more.

<sup>164</sup> *Id.* at 490.

<sup>165</sup> *Id.* at 491.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* This reasoning is especially true when one considers the fact, discussed further in Part IV, that laws requiring arrestees to submit to DNA sampling really only target individuals who are not guilty of the crime for which they have been arrested.

<sup>168</sup> *Id.* at 491–92.

Thus, the statute was held unconstitutional under the Fourth Amendment and the Minnesota Constitution.<sup>169</sup> It is not, however, the only view that has been taken in regards to arrestee DNA sampling statutes.

On September 14, 2007, the Virginia Supreme Court upheld Virginia's arrestee sampling statute in an opinion markedly different from that of the Minnesota Court of Appeals.<sup>170</sup> In *Anderson v. Commonwealth*, Angel Anderson was indicted in 2004 for allegedly raping, sodomizing, and robbing Laura Berry on July 23, 1991.<sup>171</sup> He was connected to this crime only after being arrested in 2003 on unrelated charges of rape and sodomy and being forced, pursuant to Virginia's arrestee DNA sampling statute,<sup>172</sup> to submit to a buccal swab for the purpose of extracting and analyzing his DNA.<sup>173</sup> In response, Anderson argued that the DNA sample was an unconstitutional search under the Fourth Amendment.<sup>174</sup>

The Virginia Supreme Court characterized the swab as "minimally intrusive" and therefore spent essentially none of the opinion discussing the concerns of physical intrusiveness that had been quite apparent to the Minnesota Court of Appeals, and cited *Skinner* only in passing to recharacterize Anderson's seizure claim as that of a search.<sup>175</sup> Instead, the critical issue for the court was the degree to which DNA profiles are analogous to fingerprinting, on the ground that, "[w]hen a suspect is arrested upon probable cause, his identification becomes a matter of legitimate state interest and he can hardly claim privacy in it."<sup>176</sup> The court "accept[ed] this proposition because the identification of suspects is relevant not only to

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<sup>169</sup> *C.T.L.*, 722 N.W.2d at 492. Members of the Minnesota Bar were divided on whether this decision was a victory for the public or a loss. Michelle Lore, *DNA Sample Decision in MN Gets a Mixed Reaction from Bar*, MINN. LAW., Oct. 23, 2006, at 3. In particular, several lawyers felt that the decision relied on outdated case law and a limited understanding of how advanced technologies are becoming accepted parts of society. *Id.* at 3, 5. On the other hand, others felt the decision clearly reaffirms the presumption of innocence and the importance of the probable cause requirement of the Fourth Amendment. *Id.*

<sup>170</sup> *Anderson v. Commonwealth*, 650 S.E.2d 702, 708 (Va. 2007). Virginia's statute requires that "[e]very person arrested for the commission or attempted commission of a violent felony as defined in [certain sections of the Va. Code] . . . shall have a sample of his saliva or tissue taken for DNA . . . analysis to determine identification characteristics specific to the person." VA. CODE ANN. § 19.2-310.2:1 (2008).

<sup>171</sup> 650 S.E.2d at 703, 704.

<sup>172</sup> VA. CODE ANN. § 19.2-310.2:1 (2008).

<sup>173</sup> *Anderson*, 650 S.E.2d at 704.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 706 n.2.

<sup>176</sup> *Id.* at 705 (quoting *Jones v. Murray*, 962 F.2d 302, 306 (4th Cir. 1992)).

solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes.”<sup>177</sup>

The court then rejected the claim by the defendant that *Edmond* and *Ferguson* condemn the kind of suspicionless search conducted here on the ground that individualized suspicion is not necessary because the DNA sampling is a part of “routine booking procedures.”<sup>178</sup> The court does not directly state that the intrusiveness of the search is not relevant in the consideration of searches conducted as part of “routine booking procedures,” however, because it employs the same “totality of the circumstances” balancing test adopted by the Fourth Circuit in upholding a convicted felon sampling statute,<sup>179</sup> stating, “the minor intrusion caused by the taking of a [DNA] sample is outweighed by Virginia’s interest . . . in determining inmates’ ‘identification characteristics specific to the person’ for improved law enforcement.”<sup>180</sup>

Thus, the court specifically attached its rationale to the notion that DNA sampling through buccal swab is not particularly intrusive, and also that a DNA profile aids the booking process by providing a more precise method of identifying and processing a defendant than those used before. As for individualized suspicion, the court sees the issue as resolved by the fact that the state has an interest in DNA samples as a more sophisticated form of fingerprint identification: because the taking of the DNA sample is justified as a routine booking procedure, no additional finding of probable cause is required.<sup>181</sup> As such, its analysis takes a very different approach to arrestee DNA sampling statutes compared to that of the Minnesota Court of Appeals. These two opinions are only the first to emerge, however, and they are not extensive treatises on the subject. Further analysis of arrestee DNA collection statutes in light of the rationales employed so far is needed.

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<sup>177</sup> *Anderson*, 650 S.E.2d at 705. As mentioned, however, federal law requires that state access to the national CODIS database is contingent upon the state having laws requiring the expungement of DNA samples from individuals arrested but not found guilty within a certain time period. See *supra* note 31 and accompanying text. Thus, while the state may keep fingerprints to help solve future crimes, Congress has seen fit to make a distinction in the case of DNA obtained from arrestees. *Id.*

<sup>178</sup> *Anderson*, 650 S.E.2d at 706.

<sup>179</sup> *Jones*, 962 F.2d at 307.

<sup>180</sup> *Anderson*, 650 S.E.2d at 706 (quoting *Jones*, 962 F.2d at 307).

<sup>181</sup> *Anderson*, 650 S.E.2d at 706. The court also addressed individualized suspicion earlier in the opinion while making the initial connection to fingerprinting. *Id.* at 705 (“Like fingerprinting, the ‘Fourth Amendment does not require an additional finding of individualized suspicion’ before a DNA sample can be taken.”) (quoting *Jones*, 962 F.2d at 306–07).

#### IV. STATUTORY ARRESTEE DNA COLLECTION IS UNJUSTIFIABLE UNDER THE FOURTH AMENDMENT

From these cases, a number of things are clear: First, with the exception of the District Court in *United States v. Stewart*, courts are generally in agreement that statutes requiring *convicted* persons to submit to DNA testing are constitutional, although there are differences as to the rationale. Second, the recent expansion of state laws to include arrestees has not yet been evaluated by enough courts to establish any meaningful trend. On the one hand, the fact that the rationales used for convicted persons statutes are in such flux may prove to be helpful to courts seeking to mold them to uphold arrestee statutes. On the other hand, the “totality of the circumstances” and “special needs” approaches seem to be less suited to arrestee statutes than they are currently to convicted persons. With this case law and the highly personal nature of DNA, a number of considerations should be important when analyzing challenges to statutes requiring the collection of DNA from arrestees. First, it is important to note certain characteristics of arrestee collection statutes that make them distinct from statutes requiring DNA collection from various groups of individuals who have at least been convicted of a crime. Second, the “totality of the circumstances” approach, as articulated in the context of DNA collection statutes, does not provide a wholly satisfactory form of analysis for arrestee collection statutes. Third, the “special needs” test is similarly in a poor position to justify arrestee collection statutes, albeit for entirely different reasons.

##### *A. Distinguishing Characteristics of DNA Collection from Arrestees*

The single most important characteristic of DNA collection statutes that require sampling from those merely arrested for certain crimes is that only individuals who are not guilty of the crime for which they have been arrested are affected. All arrestees forced to give samples can be divided into two groups: those who are ultimately found guilty and those who are not. The state will already get the DNA from the first group pursuant to the existing statutes in every state requiring convicted persons to submit to DNA testing. It is the second group that represents the real gain for law enforcement, and as mentioned, the defining feature of this group is not simply that they are “innocent until proven guilty,” but rather, that they are simply *not going* to be found guilty of the crime for which they have been arrested at all. Permitting the state to pass a law effectively targeting this group for submission to physically intrusive searches would be a truly unique action.

Beyond this characteristic, however, lies the fact that permitting the collection of DNA from arrestees would dramatically increase the number of samples being collected by the government. In 2004, law enforcement

authorities made a total of 13,938,071 arrests.<sup>182</sup> Of these, 586,558 are for violent felonies.<sup>183</sup> Sexual offenses account for an additional 90,913.<sup>184</sup> While the current database holds only about 5.26 million samples,<sup>185</sup> there are already concerns about the potential for human error in analyzing all these samples.<sup>186</sup> These statistics show just how drastically the rate of DNA collection would increase if arrestees were included.<sup>187</sup> This factor should be taken into account by courts considering the government's interest in collecting DNA. Investigating and prosecuting crimes are thoroughly dependent on both an effective and efficient law enforcement community.

In addition to these bureaucratic considerations, equality concerns are also implicated by DNA collection from arrestees, as opposed to convicted persons. African-Americans currently make up 12.3% of the total population of 281,421,906,<sup>188</sup> however they account for 26.8% of all adult arrests and 27.5% of all juvenile arrests.<sup>189</sup> It has already been argued that these disparities are the result of racial profiling.<sup>190</sup> Expanding DNA collection to

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<sup>182</sup> FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2004: UNIFORM CRIME REPORTS 280 tbl.29, available at [http://www.fbi.gov/ucr/cius\\_04/persons\\_arrested/table\\_29.html](http://www.fbi.gov/ucr/cius_04/persons_arrested/table_29.html). This data is collected from the District of Columbia and the 46 states that submit the information to the FBI voluntarily. Data from the other four states is reported to the FBI by local law enforcement agencies. *Id.* at 488 app. I, available at [http://www.fbi.gov/ucr/cius\\_04/appendices/appendix\\_01.html](http://www.fbi.gov/ucr/cius_04/appendices/appendix_01.html).

<sup>183</sup> *Id.* at 280 tbl.29. "Violent crimes" is defined as murder, forcible rape, robbery, and aggravated assault. *Id.*

<sup>184</sup> *Id.* "Sexual offenses" does not include forcible rape, which is included in the category of violent felonies. *Id.*

<sup>185</sup> Fed. Bureau of Investigation, NDIS Statistics, *supra* note 26.

<sup>186</sup> Perry, *supra* note 108.

<sup>187</sup> Indeed, while the United Kingdom is often noted for having the most inclusive DNA database of any country, see TIMES ONLINE, *supra* note 11, the smaller size of the UK reduces some of the pressures that come from bureaucratic control. The current database holds approximately 3,785,781 samples. UNITED KINGDOM HOME OFFICE, THE NATIONAL DNA DATABASE ANNUAL REPORT 2005–2006, at 29, available at <http://www.homeoffice.gov.uk/documents/DNA-report2005-06.pdf>. Thus, the bureaucratic concerns are not as pressing in the UK.

<sup>188</sup> U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 CENSUS OF POPULATION AND HOUSING, at 1, available at <http://www.census.gov/prod/cen2000/dp1/2kh00.pdf>. Currently, however, the total population is estimated to be over 300,000,000. U.S. Census Bureau, U.S. and World Population Clocks, <http://www.census.gov/main/www/popclock.html> (last visited on Feb. 14, 2009).

<sup>189</sup> FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2004: UNIFORM CRIME REPORTS 298–300 tbl.43, available at [http://www.fbi.gov/ucr/cius\\_04/persons\\_arrested/table\\_38-43.html](http://www.fbi.gov/ucr/cius_04/persons_arrested/table_38-43.html).

<sup>190</sup> See, e.g., Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 658 (2002) (analyzing



include arrestees would result in African-Americans being forced to submit to these suspicionless, physically intrusive searches at a disproportionately high rate.<sup>191</sup> This is an additional factor that should be taken into account by courts, as these statutes constitute government action that results in intrusions into the privacy of a specific group far more than others.

Thus, the facts that forcing arrestees to submit to DNA testing really only targets those that are not guilty of the crime for which they've been arrested, results in an unmanageable bureaucratic process that is more susceptible to human error, and exacerbates an already large racial disparity should be taken into account by courts considering constitutional challenges to such statutes. These facts add new complications to a doctrinal struggle that is already unlikely to result in a finding of constitutionality for arrestee DNA collection statutes under the "totality of the circumstances" approach.

#### *B. Applying the "Totality of the Circumstances" Test to Arrestee DNA Collection Statutes*

Courts applying the "totality of the circumstances" approach in the context of convicted persons have been forced to confront whether the requirement of individual suspicion is an insurmountable one. The plurality in *Kincade* felt it was not, and the court in *Stewart* felt it was more of a strong consideration to be factored in to the expectation of privacy prong of the "totality of the circumstances" test. In truth, this is likely the legal consideration that is least affected by the change in factual circumstances from convicted persons to arrestees.

The *Kincade* plurality began its discussion of the "totality of the circumstances" test by noting that *Ferguson* and *Edmond* do not explicitly condemn searches lacking in individualized suspicion that are not also covered by the "special needs" exception.<sup>192</sup> Judge Reinhardt is similarly unable to cite any cases directly holding that individual suspicion is required in all "totality of the circumstances" cases.<sup>193</sup> Thus, it does not seem likely that if arrestee DNA collection statutes are struck down it will be solely

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demographic data collected on stops and arrests along I-95 in Maryland pursuant to a 1995 Maryland court order and arguing that racial profiling played a role in determining what cars police officers focused on); Daniel J. Grimm, Note, *The Demographics of Genetic Surveillance: Familial DNA Testing and the Hispanic Community*, 107 COLUM. L. REV. 1164 (2007) (arguing that familial DNA testing will disproportionately impact the Hispanic community).

<sup>191</sup> See JENNY RUSHLOW, COUNCIL FOR RESPONSIBLE GENETICS, RAPID DNA DATABASE EXPANSION AND DISPARATE MINORITY IMPACT, available at <http://www.gene-watch.org/DNADatabases/RushlowReport.pdf>.

<sup>192</sup> *Kincade en banc*, 379 F.3d at 832.

<sup>193</sup> *Id.* at 843.

because they are suspicionless searches. On the other hand, the plurality's additional justification for lowering the concerns regarding the suspicionless aspect of DNA collection was the "jurisprudentially sound analytic division" between conditional releasees and the general public.<sup>194</sup> This reasoning could mean that in the context of arrestees, individualized suspicion should play more of a role. After all, if the general public deserves individualized suspicion, shouldn't members of the general public who get caught up in a police investigation still have that protection? Remember, arrestee statutes primarily impact those members of the general public who are arrested but not ultimately found guilty. If arrestees fall on the *Kincade* side of the "jurisprudentially sound analytic distinction," then Judge Kozinski may be right that a loophole will soon be swallowing the Fourth Amendment.<sup>195</sup>

As for the governmental interest, Judge Young seems to have a solid grasp of the major issues involved.<sup>196</sup> The *Kincade* plurality employs the government interest in supervising probationers.<sup>197</sup> Judge Young's rejection of this on the ground that the rationale of the case law supporting this governmental interest does not apply to DNA<sup>198</sup> contains persuasive force that is equally applicable in the context of arrestees. If past case law, such as *Schmerber*, is founded on the idea that the intrusion is justified by the government's interest in preventing the destruction of evidence (such as alcohol in blood), then the government cannot have a very strong interest in DNA as destructible evidence simply because the DNA contained in an arrestee's body cannot be destroyed, and therefore cannot thwart government prosecution for a specific crime. The police should properly get a warrant if they have reason to suspect DNA will be useful evidence. Thus, a governmental interest in supervising former arrestees—particularly those that have ultimately not been found guilty—cannot be given much weight. Indeed, because the DNA collected from arrestees not ultimately found guilty cannot be included in any database if a state wishes to have access to CODIS, there really cannot be any supervision at all aside from that intermediate time during which the case is being adjudicated.

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<sup>194</sup> *Id.* at 832.

<sup>195</sup> *Id.* at 872 ("[I]t's hard to see how we can keep the database from expanding to include everybody . . . I'm hard pressed to see how [the plurality's test] would violate anyone's Fourth Amendment rights.") (Kozinski, J., dissenting).

<sup>196</sup> *United States v. Stewart*, 468 F. Supp. 2d 261, 269–270 (D. Mass. 2007) (noting three primary governmental interests: supervising probationers, preventing recidivism through deterrence, and promoting the expansion of DNA databases for the investigation of past and future crimes and rejecting all three in the context of a statute requiring DNA collection from a probationer).

<sup>197</sup> *Kincade en banc*, 379 F.3d at 835.

<sup>198</sup> *Stewart*, 468 F. Supp. 2d at 272.

The governmental interest in deterring recidivism noted by the *Kincade* plurality<sup>199</sup> is even less persuasive in the context of arrestee statutes. As Judge Young noted, this rationale is simply unconvincing when one considers the fact that many of the crimes requiring DNA collection are not ones that criminals could be deterred from committing because of a fear of leaving DNA behind that would lead the police to your door.<sup>200</sup> When one is asking whether individuals who are not guilty of the crime for which they've been arrested will be deterred from committing crime in the future because they've been forced to temporarily give the police a DNA sample, the proposition nearly becomes laughable for two reasons. First, because the law requires the sample be destroyed when no guilt is found, the deterrent effect would only be temporary and would only duplicate the deterrent effect of the pending criminal proceedings. And secondly, how strong of an interest could the government have in deterring a group of individuals from committing crime when that group is, by definition, one that the government does not know has committed crime in the past? If it is a strong one, then we may be one step away from acknowledging a strong governmental interest in deterring all citizens from committing crime, thereby justifying a law requiring all citizens to leave a DNA sample on file with the government. At this point, the slippery slope will be but a fond memory.

Lastly, the government interest in promoting the expansion of DNA databases for the investigation of past and future crimes seems to be the one on which the government is likely to stand with the strongest footing. It is also, however, the most broad and generalized. In many ways, this is the rationale used by the Virginia Supreme Court in *Anderson*.<sup>201</sup> Fingerprints are absolutely useful tools in investigating past and future crime, but there must be limits. As Judge Young noted, this interest is so generalized that the "reasonableness" requirement of the Fourth Amendment will have no meaning if this interest in investigating crime trumps all countervailing concerns.<sup>202</sup> Perhaps this concern should, as Judge Young felt, be diminished as the lack of individualized suspicion on the person targeted increases.<sup>203</sup> In the context of arrestees, they are presumed innocent until proven guilty and, when it comes to physically intrusive searches, should be treated as members of the general public. If probable cause exists, the police may absolutely get a

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<sup>199</sup> *Kincade en banc*, 379 F.3d at 833, 839.

<sup>200</sup> *Stewart*, 468 F. Supp. 2d at 272 (noting the crimes that are covered but likely won't be deterred).

<sup>201</sup> *Anderson v. Commonwealth*, 650 S.E.2d 702, 705 (Va. 2007) (stating that taking a DNA sample is part of the process or routine "booking procedures" and not unlike taking fingerprints).

<sup>202</sup> *Stewart*, 468 F. Supp. 2d at 273.

<sup>203</sup> *Id.* at 278-79.

warrant to obtain a DNA sample, but if not, the police should not be able to get that DNA through a law targeting people that are not guilty of the crime for which they've been arrested.

This presumption of innocence also factors into the second prong of the "totality of the circumstances" approach. In *Kincade*, the plurality found the defendant's expectation of privacy diminished because of the fact that he was a convicted felon.<sup>204</sup> At this point, the Minnesota Court of Appeals seems to make its most forceful point:

[B]ecause a person who has been charged is presumed innocent until proved guilty, we see no basis for concluding that before being convicted, a charged person's privacy expectation is different from the privacy expectation of a person who was charged but the charge was dismissed or the person was found not guilty.<sup>205</sup>

Further, the fact that arrestee statutes really only target individuals who are not ultimately found guilty of the crime for which they've been arrested lends further support to the notion that those affected by this law do not have a reduced expectation of privacy. It again strains the relevance of the "reasonableness" requirement to say that the government may target a group it knows will not be found guilty in a court for forcible DNA collection.

It thus seems to make sense to say that statutes requiring arrestees to submit DNA samples to police cannot be justified under the general "totality of the circumstances" test. The Virginia Supreme Court may have provided a way around this, however. By characterizing the DNA sample as akin to a fingerprint,<sup>206</sup> the court rejects the notion that all physically intrusive searches are deserving of greater scrutiny.<sup>207</sup> This begs the question whether, in the modern day, something as simple as a buccal swab really is intrusive in a meaningful way?<sup>208</sup> It is done with a Q-tip, causes no pain, and takes no more than two seconds. It doesn't even leave any residue on the individual in the way that fingerprinting does. Thus, DNA sampling upon arrest, at least

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<sup>204</sup> *Kincade en banc*, 379 F.3d at 837.

<sup>205</sup> *In re Welfare of C.T.L., Juvenile*, 722 N.W.2d 484, 491–92 (Minn. Ct. App. 2006).

<sup>206</sup> *Anderson*, 650 S.E.2d at 706.

<sup>207</sup> *Id.* (citing *Schmerber v. California*, 384 U.S. 757, 767, 768 n.2 (1966)).

<sup>208</sup> *In Kyllo v. United States*, 533 U.S. 27 (2001), Justice Scalia's opinion for the Court seemed to indicate that as new technologies become more pervasive in our society, our expectation of privacy will diminish accordingly. *Id.* at 33–34. In the context of buccal swabs, this author remembers submitting to them for a high school biology class for the purpose of isolating his own DNA as part of a laboratory exercise. As these exercises become more and more prevalent in high school and college experiences, perhaps such swabs upon arrest will no longer be seen as deserving of extra protection?

when done through buccal swab, may be fairly characterized by courts as similar to fingerprinting insofar as the physical intrusiveness is concerned.

That said, it does seem a bit disingenuous to say that these statutes seek DNA samples for the purpose of aiding the booking process. While an ancillary benefit of taking a DNA sample may be a precise identification of that individual within the police record-keeping system, the primary (and perhaps the sole) purpose of the legislatures in passing these statutes is to use the DNA sample to check against a database to see if the arrestee is wanted in connection with any other crimes.<sup>209</sup> As a result, it may be appropriate for courts to look to legislative history to see whether it is established that the DNA sample is necessary for the identification of the individual within the police record-keeping system as opposed to connecting the arrestee to other crimes. Nonetheless, if these laws are to be upheld, the “routine booking procedures” route seems to be the best, in light of the troubles one encounters when characterizing the governmental interest and expectation of privacy in other ways. An alternative route, however, is to ask whether the “special needs” test can justify these statutes.

### C. Is There Any “Special Need” for Collecting DNA from Arrestees?

The best examples of application of the “special needs” test to DNA collection statutes have been employed by Judge Gould, supplying the critical vote in *Kincade*, and Judge Walker in *Goord*. No real consensus has emerged on just what that precise special need is, however. In fact, it seems to depend on whether the defendant is a prisoner, probationer, or something else.<sup>210</sup> The reason for this may be simply that the Supreme Court has not sufficiently developed precisely what it meant in *Ferguson* and *Edmond* regarding “detection of ordinary criminal wrongdoing” and “law enforcement purposes.” As a result, the standard is somewhat malleable, and,

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<sup>209</sup> Indeed, even the Virginia Supreme Court noted that Virginia had an interest in the DNA for its usefulness in solving past and future crimes. *Anderson*, 650 S.E.2d at 705 (“the identification of suspects is relevant not only to solving the crime for which the suspect is arrested, but also for maintaining a permanent record to solve other past and future crimes.”).

<sup>210</sup> The *Stewart* court felt that *Samson v. California*, 547 U.S. 843, 848 (2006), answered the question of which test to apply in favor of the “totality of the circumstances” test. *United States v. Stewart*, 468 F. Supp. 2d 261, 269 (D. Mass. 2007) rev’d, 532 F.3d 32 (1st Cir. 2008). Nonetheless, *Samson* is notable because it permitted suspicionless searches of parolees on the ground that the state has an interest in supervising parolees. *Samson*, 547 U.S. at 843. *Griffin v. Wisconsin*, 483 U.S. 868, 875–76 (1987), however, applied the “special needs” test in the context of probationers, for the same supervisory reason.

to paraphrase Judge Young in *Stewart*, the permissibility of the statute seems to depend largely on how one chooses to characterize the special need.<sup>211</sup>

Before Judge O'Scannlain opted against applying the "special needs" test for the plurality in *Kincade*, he subtly commented on the doctrine by noting that, "[a]lmost as soon as the 'special needs' rationale was articulated . . . the Court applied special needs analysis in what seemed—at least on the surface—to be a clear law enforcement context."<sup>212</sup> Despite this indication that he believes the doctrine should not be wholly separate from situations where criminal enforcement is involved, he saw the doctrine as foreclosed by *Ferguson* and *Edmond* and proceeded to apply the "totality of the circumstances" test instead.<sup>213</sup>

Judge Gould did apply the "special needs" test, however; he stated the special need as that of running a supervised release system for the purpose of providing deterrence against recidivism.<sup>214</sup> As mentioned above, however, this rationale is ultimately unconvincing in the context of arrestee statutes: aside from the fact that arrestees retain a much higher expectation of privacy than supervised releasees, the deterrent effect on arrestees who are not guilty is minimal at best.<sup>215</sup> Beyond this, Judge Gould distinguished this need from the kind of "general law enforcement" prohibited by *Ferguson* and *Edmond* by noting a difference between general law enforcement activities aimed at past crime and those "with the purposes to deter future crime."<sup>216</sup> If this distinction is a valid one, it cuts against finding a special need in arrestee DNA collection statutes. The primary purpose of collecting DNA from arrestees and comparing it to a DNA database is to check if that individual has committed any crime in the past. Further, the prevention or investigation of future crime is only aided by collecting the DNA of arrestees who are ultimately found guilty. Instead, the potential to prevent or investigate future crimes committed by arrestees who are not ultimately found guilty—the real target of the laws—is undercut by the fact that the law requires their DNA to be expunged from the system after a certain period of time. Thus, the distinction is not a relevant one in the context of arrestee DNA collection statutes.

Judge Gould would likely agree, however, because as soon as he mentions this distinction he also notes what he is *not* deciding in his opinion:

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<sup>211</sup> See *Stewart*, 468 F. Supp. 2d at 269. ("The outcome of the balancing is largely determined by how the two weights in the balance are characterized.").

<sup>212</sup> *Kincade en banc*, 379 F.3d at 824.

<sup>213</sup> *Id.* at 831–32.

<sup>214</sup> *Id.* at 840.

<sup>215</sup> *Stewart*, 468 F. Supp. 2d at 272; see also, *supra* Part IV.B.

<sup>216</sup> *Kincade en banc*, 379 F.3d at 840.

“What we do not have before us is a petitioner who has fully paid his or her debt to society . . . and who has left the penal system.”<sup>217</sup> This statement limits the value of Judge Gould’s opinion with respect to arrestee statutes because, as is obvious, arrestees have never even had a debt to pay, let alone been serving in the penal system. If Judge Gould was concerned with convicted persons who had “fully paid [their] debt to society,” it does not seem to be a stretch to say that he would be equally concerned with arrestees.

Judge Reinhardt agreed with Judge Gould that the “special needs” test should apply, but disagreed with its effect in this case.<sup>218</sup> His reliance on *Lidster* for the notion that special needs “may not include efforts to obtain information related to possible crimes that the searched individual may have committed”<sup>219</sup> is instructive in the context of arrestees. The whole reason collecting this DNA is desirable is to find out whether the searched may have committed any other crimes.<sup>220</sup>

Judge Walker spins *Lidster* the other way in *Goord*, however.<sup>221</sup> He cites *Lidster* for the notion that searches generally done for “information-seeking” are permissible while searches generally done to detect evidence of “ordinary criminal wrongdoing” are not.<sup>222</sup> This reasoning blurs the line between information and evidence, however. It is true that taking DNA from an arrestee provides the police with “information,” however, it is a bit of a denial of reality to fail to acknowledge that the information sought is evidence of ordinary criminal wrongdoing committed by that individual. In *Lidster*, the information sought was said to be about *others*, not the person searched.<sup>223</sup> Thus, *Lidster* seems to support Judge Reinhardt’s view in this context.

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<sup>217</sup> *Id.* at 841.

<sup>218</sup> *Id.* at 854; *Illinois v. Lidster*, 540 U.S. 419, 423 (2004).

<sup>219</sup> *Kincade en banc*, 379 F.3d at 854–55 (noting that *Lidster* involved a road checkpoint in which the police sought information from individuals about a fatal hit-and-run that had occurred at that location a week earlier).

<sup>220</sup> That said, because DNA provides information about your close relatives as well, see *supra* note 17 and accompanying text, one could imagine police seeking to obtain one person’s DNA simply to see if a relative suspected of a crime, but unavailable to police, should be considered further. This scenario is a bit far-fetched, however, and is simply not the primary reason why arrestee DNA is sought.

<sup>221</sup> *Goord*, 430 F.3d at 668.

<sup>222</sup> *Id.*

<sup>223</sup> *Lidster*, 540 U.S. at 423 (“The stop’s primary law enforcement purpose was *not* to determine whether a vehicle’s occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. *The police expected the information elicited to help them apprehend, not the vehicle’s occupants, but other individuals.*”) (second emphasis added).

Aside from these views expressed in *Kincade* and *Goord*, one is left to wonder what other special needs might be stated for arrestee statutes. Because the Supreme Court has yet to clarify precisely what was meant in *Ferguson* and *Edmond*, lower courts have seemed free to mold this malleable standard however they see fit. If the prohibition is intended to be a broad one, DNA collection statutes will likely be unconstitutional. There has not been a definitive statement from the Court, however, that the mere presence of one purpose related to detection of criminal wrongdoing is enough to strike a law. And to further complicate things, some searches can be “multi-purpose” searches—where the primary purpose is civil or administrative, but has detection of criminal wrongdoing as an incidental purpose or additional effect.<sup>224</sup> Professor Maclin notes that the Supreme Court has indicated an acceptance of this “interpretative surgery” in *New York v. Burger*.<sup>225</sup> The New York statute in *Burger* permitted warrantless, suspicionless searches of junkyard dealers.<sup>226</sup> The Supreme Court upheld the law, noting that the New York Court of Appeals had “failed to recognize that a State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions.”<sup>227</sup> If the primary purpose is that of an administrative search, then an incidental “contribution” to criminal law enforcement does not render the law invalid.<sup>228</sup>

Professor Maclin notes that a similar strategy could be employed here in the context of arrestees: perhaps the state has an administrative interest in “discerning the true identities of individuals subject to arrest.”<sup>229</sup> Thus, any incidental effect in aid of detecting criminal wrongdoing does not render the statute outside the scope of special needs. Professor Maclin agrees with others, however, that have found this description of the purposes of arrestee statutes disingenuous.<sup>230</sup> Ultimately, Professor Maclin believes that this “interpretative surgery” will not carry the day.<sup>231</sup>

Though this author agrees with this reasoning, it is submitted that one should not underestimate the degree to which it is likely that arrestee DNA statutes actually will be upheld on grounds similar to this, especially in light

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<sup>224</sup> See Maclin, *supra* note 19, at 180.

<sup>225</sup> *Id.*; 482 U.S. 691 (1987).

<sup>226</sup> *Burger*, 482 U.S. at 691.

<sup>227</sup> *Id.* at 712.

<sup>228</sup> *Id.* at 716.

<sup>229</sup> Maclin, *supra* note 19, at 180–81.

<sup>230</sup> *Id.* at 181 (quoting David H. Kaye, *Two Fallacies About DNA Data Banks for Law Enforcement*, 67 BROOK. L. REV. 179, 203 (2001) (“The legislative interest in DNA data bases has not been primarily to supplement or supplant fingerprints as markers of true identity; it has always been to generate investigative leads.”)).

<sup>231</sup> Maclin, *supra* note 19, at 181.



of opinions such as the one in *Anderson*. The usefulness of DNA as an identifier of individuals does have application beyond the investigative stage of law enforcement. In an effort to avoid statutes of limitation, police have begun indicting the DNA found at a crime scene as the true identity of the perpetrator.<sup>232</sup> In this regard, DNA technology is being employed as an identifier far more precise than a name—something more akin to a bar code. Given the fact that individuals may, and often do, seek to lie to the police about their identity, it does not seem too far-fetched to think that using DNA as a “lie-proof” form of identification that is far more accurate—and impossible to destroy, unlike fingerprints—can be a legitimate interest of the government. A defense against a statute claimed to be unconstitutional would do well to attempt to establish a record of police need for precise identification of arrestees. The next chance the Court has to address the “special needs” test may well result in a refinement of the prohibition of searches for detection of “ordinary criminal wrongdoing” to meet the needs and prevalent uses of DNA technology in our society.

As a result, it does not seem to be impossible that DNA collection statutes focusing on arrestees could be upheld against constitutional attack, either on the grounds that DNA sampling is so common and so minimally intrusive that it passes the general “totality of the circumstances” test or because of a “special need” to discern the true identity of an arrestee. Despite this, however, the fact that such laws really target individuals who are not guilty of the crimes for which they’ve been arrested, occur without individual suspicion, and seem to simply advance an interest in ordinary law enforcement counsels against a finding of constitutionality under the Fourth Amendment.

## V. CONCLUSION

The last eighteen years have seen the birth and an immense expansion of the use of our genetic material in law enforcement, culminating with DNA databases that currently hold the DNA profiles of over five million people. Statutes requiring convicted persons to provide DNA samples have arisen in one form or another in every state. Challenges to these statutes have uniformly failed, however, fourteen states now require certain groups of arrestees to submit their DNA as well. The legal challenges to these laws have not provided much case law as of yet, but as DNA technology becomes

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<sup>232</sup> Court TV, *Indicting John Doe: When All You Have is DNA*, CNN.COM, December 31, 2007, <http://www.cnn.com/2007/US/law/12/10/court.indicting.dna>; see also Andrew C. Bernasconi, Comment, *Beyond Fingerprinting: Indicting DNA Threatens Criminal Defendants’ Constitutional and Statutory Rights*, 50 AM. U. L. REV. 979, 981–82 (2001).

more and more capable of exposing highly personal information, our experience should guide us to believe that a line must be drawn somewhere. Unless we are comfortable with universal DNA collection and retention by the government, it is necessary to push back against the rising tide of statutes seeking to force more and more individuals to submit to DNA collection. Because neither the “totality of the circumstances” test nor the “special needs” test provide wholly satisfactory justifications for DNA collection from arrestees, these statutes should be found unconstitutional.